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A Legal Analysis of Employee Involvement in the European Company (SE) and EU Corporate Governance

by

Mrinal Vijay

**Thesis Submitted to Durham University in Fulfilment for the degree of Doctor
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ABSTRACT

Employee involvement in a company's affairs is one of the elementary aspects of European corporate governance, but is yet to make substantial progress. European Company Statute (Council Regulation No 2157/2001¹ and Council Directive No 2001/86/EC²) was legislated to secure employees' involvement rights in company decisions and with a vision to establish a uniform legal framework, but specific legal frameworks have been left at the discretion of Member States where the European Company (SE³) is registered. As a result, 28 different national SE laws are now in force. This research critically analyses and compares employee involvement in the corporate governance of Member States and in the SE, and then recommends modifications to the European Company Statute so that the SE can become a more popular company form in the EU. The prime focus of the research is board-level employee representation, which is the most controversial aspect of employee involvement. Employee representation, which supposedly constrains managements' privileges, has been debated by the European Commission since 1960s. However, the specific issue of board-level employee representation in the SE from a legal standpoint has remained principally untouched. The provisions for board-level employee representation reflect a laissez-faire approach. The European Company Statute is quite ambiguous and the employee involvement aspect within the Member States is largely uncertain. The research challenges the existing narratives about the shortcomings and suggesting reforms to the European Company Statute. In that process, dismissing the standard explanation of shortcomings and subsequently identifying novel solutions to those shortcomings. The last major contribution was Ernst & Young's 'Study on the operation and the impacts of the Statute for a European Company (SE)',⁴ but this was published in 2008 with limited data and experience of only three years of the SE coming into force. It was a decade ago. However, this research is based on the SE's 13 years of experience, thereby, providing a better assessment on the issue.

¹ Council Regulation (EC) 2157/2001 on the Statute for a European company [2001] OJ L294.

² Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294/22.

³ SE (Società Europea) is the company form introduced by the European Company Statute.

⁴ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (Ernst & Young, 2008)

<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf>

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ABBREVIATIONS

ACAS- Advisory, Conciliation and Arbitration Service
BDA- Confederation of German Employers' Associations
BDI- Federation of German Industry
CBI- Confederation of British Industry
CCCTB- Common Consolidated Corporate Tax Base
COHSE- Confederation of Health Service Employees
CSR- Corporate Social Responsibility
EC- European Commission
ECS- European Company Statute
ESOP- Employee Stock Ownership Plan
ETUI- European Trade Union Institute
EU- European Union
EWC- European Works Council
ICAEW- The Institute of Chartered Accountants in England and Wales
IFA- *Institut Français des Administrateurs*
JCC- Joint Consultative Committees
NALGO- National and Local Government Officers' Association
NUPE- National Union of Public Employees
NWC- National Works Council
OECD- Organisation for Economic Co-operation and Development
PDG- President Director General
SE- Societas Europaea (European Company)
SNB- Special Negotiation Body
SPE- European Private Company
TUC- Trades Union Congress
UK- United Kingdom
US- United States

INTRODUCTION

The European Company or 'Societas Europaea' (hereafter, referred to as the "SE") is a corporate entity that was established after few decades of dialogue between the Member States and European Commission (hereafter, referred to as the "EC"). The idea of the SE is not new given the long history of negotiations. It was not until two years after the transposition deadline that the Council Regulation (EC) No 2157/2001⁵ and Council Directive No 2001/86/EC⁶ (together referred to as the European Company Statute, hereafter, referred to as the "ECS") was transposed in all Member States.⁷ The term 'employee involvement' refers to any mechanism, consisting of information, consultation and participation, through which employee representatives may exercise control over a company's decisions, affairs or undertakings.⁸

EU legislators claim that ECS contribute substantially to 'social welfare'⁹. They thus, according to these legislators, contribute to the EU's wider ambition to match its superiority as an economic power with greater social responsibility. Legislators claim that these directives extensively protect the interests of weaker stakeholders and promote employee involvement, especially representation. The EU's desire to create a 'European social model'¹⁰ has led to several procedural and policy questions (e.g. an ideal employee representative model), and structural problems (e.g. subsidiarity principle).¹¹ In particular, the company law in Member States might be inclined to serve shareholders at the expense of employees and other stakeholders.

Employee representation at board level is one of the most controversial aspects of the social economy. In spite of much interest in the subject, little legal research has been conducted on it; as a result, the issue remains confused. Some sort of board-

⁵ Council Regulation (EC) 2157/2001 8 October 2001 on the Statute for a European company (SE) [2001] OJ L294.

⁶ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294/22.

⁷ ECS was adopted in 2001 and entered into force in 2004.

⁸ Article 2 (h) and Article 2 (k) of the SE Directive.

⁹ The welfare of employees is regarded as social welfare in this context.

¹⁰ Article 138-139 of The Social Chapter of the EU Charter.

¹¹ F Butler, 'Social Policy and the European Community: Proposals for Worker Participation Legislation' (1991) 6 (1) Public Policy and Administration 72-79.

level employee representation is provided in 19 out of 28 Member States, but employee involvement exists in only 105 out of 2,757 established SEs across the EU.¹² This difference of representation figures across the Member States might be explained as being due to 'technological and demographic context, social attitudes, economic scenarios, public policy and law'.¹³ But they are hard to justify, given that board-level employee involvement is a recognised European fundamental right under Article 153 of The Treaty on European Union.¹⁴ Article 153 seeks to promote the EU's social policy.¹⁵ It provides that:

'the Union shall support and complement the activities of the Member States in the following fields: [...] representation and collective defence of the interests of workers and employers, including codetermination'.

In respect of social dialogue, Article 153 is the most important social article in identifying and promoting the function of social partners in an enterprise. Against this background, the objectives of this research are to: (i) analyse the ECS in detail, especially its provisions on employee representation¹⁶; (ii) analyse the rationale for employee involvement and the factors influencing or discouraging it within different Member States (a comparative study);¹⁷ (iii) evaluate whether the ECS has adopted

¹² Figures correct as 31 March 2017; see, 'SE Companies: Facts and Figures 2017' (*SEEurope*, March 2017) <<http://www.worker-participation.eu/European-Company-SE/Facts-Figures>> accessed 18 April 2017.

¹³ S Schwimbersky, 'Worker participation in Europe- Current developments and its impacts on employees outside the EU' [2005] AIRAANZ 189-198.

¹⁴ Consolidated Version of the Treaty on European Union [2016] OJ C202.

¹⁵ EU social policies are covered in Articles 151-161 of The Treaty on European Union.

¹⁶ This will include identifying any shortcomings of the ECS and potential corrections to effectively achieve the EU's intended objectives to "support and complement the activities of the Member States in: [...] representation and collective defence of the interests of workers and employers, including codetermination" (per Article 153 of The Treaty on European Union).

¹⁷ The research will make an attempt to explore all possible rationales behind employee involvement as discussed from the perspectives of EU legislators and scholars. One of the first discussions on employee involvement by EU legislators (see, Commission, 'Employee participation and company structure in the European Community' COM (1975) 150) emphasised the following rationale: from a legal standpoint, employee involvement develops social democracy and is a good corporate governance practice. From an economic standpoint, employee representation is regarded as a way of promoting information exchange, decreasing transaction costs and negotiating a course through changed scenarios (see, HA Simon, 'A Formal Theory of the Employment Relationship' (1951) 19 (3) *Econometrica* 293-305). However, no unanimous consensus yet has been reached as to whether employee involvement is beneficial, detrimental or neutral in a good corporate governance of SE, despite numerous research attempts.

potentially a laissez-faire approach towards the issue of employee representation;¹⁸ (iv) critically analyse whether the German model of employee involvement in corporate governance is superior to the United Kingdom's (UK) laissez-faire approach on employee involvement; and (v) recommend measures to enhance the application of the Council Directive No 2001/86/EC¹⁹ (hereafter, referred to as the "SE Directive") provisions and enable the SE to be a more functional European company form.

In the process, the author attempts to fill the gaps in the literature for employee representation rights at board level from a legal standpoint. 90% of current literature is from economic,²⁰ human resources or social perspectives;²¹ and is conducted from the perspectives of trade union / worker representative researchers.²² Inconsistent conclusions have been drawn from various researches so far, which have been unable to provide clear guidance on whether employee involvement is in fact needed in corporate governance in EU. It is argued by academics and economists that there is currently no clear evidence of the correlation between board-level employee representation and a company's economic performance. The question as to whether board-level employee representation is detrimental or beneficial to company economic performance is as old as the first debates on the legitimacy for employees to be represented in the boardroom. Marchington et al., writing in *New Developments in Employee Involvement*, conclude that it was "problematic to make any precise evaluation" about whether employee involvement affects corporate performance.²³

¹⁸ Analysing the effectiveness of the ECS and substantial arguments supported by evidence will demonstrate that unanimous employee involvement rights are essential within the EU for good corporate governance.

¹⁹ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294/22.

²⁰ For example, M Gold, S Deakin etc.

²¹ For example, K Lörcher's research is mostly cited by The European Trade Union Institute (ETUI) in their publications.

²² For example, A Conchon, J Williamson etc.

²³ Marchington et al., 'Understanding the Meaning of Participation: Views from the Workplace' (1994) 47 (8) Human Relations 867-894.

This research will assert that employee representation, generally and at board level, along with the 'trivial' directives that regulate it,²⁴ are complex and ambiguous aspects in EU Company Law. EU legislators have taken a laissez-faire attitude to employee representation: they are neither moving fully in the direction of social welfare nor enhancing board-level rights for employees. EU legislators either represent or reflect Member States, and Member States themselves lack unanimity on social welfare proposals among EU Member States (e.g. the failure of the 'Vredeling' Directive).

The research will seek to answer mainly three legal questions that have not yet been comprehensively analysed. First, the effect of the SE Directive will be questioned: has it led to a weakening of codetermination rights in SEs or improved the provisions of employee involvement and the legal uncertainties in the SE Directive with respect to negotiation procedures and employee involvement procedures. Second, why is there an inconsistency with respect to employee involvement rights within corporate boards across the EU? How has the ECS been implemented in the UK, and has there been any change in the UK's attitude to employee involvement rights? Lastly, does the EC's framework and consultation embrace employee involvement, and has this framework been well articulated? What aspects were not addressed in the SE Directive? What amendments to the SE Directive will better achieve the objectives stated in Article 153 of The Treaty on European Union and make employee involvement a prominent aspect of EU corporate governance?

In relation to the problems in question and research objectives, the researcher has adopted a socio-legal and comparative approach. A broad range of contemporary sources have been reviewed and analysed, such as existing case law and legislation, journals, textbooks, conference proceedings papers, government policy documents, international treaties, and web pages. The research has derived evidence from the following components:

1. Analysis of existing, proposed and emerging legislation- ECS has been extensively examined in line of employee involvement for the purpose of this research. Initial debates, academic works and Green Papers on the issue have been carefully

²⁴ L Enriques, 'EC Company Law Directives And Regulations: How Trivial Are They?' (2006) 27 (1) University of Pennsylvania Journal of International Law 2, 44.

studied to answer most of the research objectives and questions (for example, rationale, shortcomings and analytical solutions or conclusions).

2. Analysing empirical research- Empirical data gathered by other researchers has been used to investigate the efficacy of corporate governance in SEs. This evidence has provided the basis of legal arguments to grant board-level employee representation rights. For example, Workplace Representation and Participation Survey Research UK concluded that companies with successful employee representation perform 17% better than companies that lack it.²⁵ On the contrary, an empirical investigation by Gorton and Schmid found that companies with equal employee representation at board-level trade at a discount of 31% in comparison with companies comprised of one-third representation on the board-level.²⁶ This research has paid minimal attention in analysing economic effects of these claims, but has investigated the matter in a legal and social context.
3. Comparative legal research- A comparative and multijurisdictional survey approach has also been adopted in the research due to the nature of the topic. The levels of employee involvement in companies differ across Member States and the transposition of the ECS is left to the discretion of each Member State. The research will draw analysis from Member States. To make a comparison, the jurisdictions and the position of all 28 Member States will be studied with respect to the SE model. Corporate governance in the UK (with minimal employee representation) has been compared with that of Germany (equal employee representation in eligible scenarios) to provide a useful comparison with respect to the interests of employee and other stakeholders. Furthermore, this comparison has provided for the exploration of adequate and essential conditions for board-level representation rights.

²⁵ Workplace Employment Relations Study (2013)
<<https://www.gov.uk/government/collections/workplace-employment-relations-study-wers>> accessed on 2 March 2014

²⁶ G Gorton and F Schmid, 'Capital, Labor and the Firm: A study of German Codetermination' (2004) 2 Journal of the European Economic Association 863-905

The structure of this research is as follows:

Chapter 1- Employee Involvement in the EU's Corporate Governance Regime will provide a background and history to the issue of employee involvement in the EU. The ambiguity of defining employee involvement for the purposes of SE Directive will be analysed and employee involvement in the context of the ECS will be introduced.

Chapter 2- Justifying Employee Involvement in Corporate Governance will make an attempt to argue all possible rationales for employee involvement as discussed from the perspectives of academics and EU legislators. An empirical component will form basis of this chapter with respect to analysing the empirical evidence of the empirical case studies undertaken by other researchers. The conclusive investigation will provide for the basis of legal arguments on the validity of the argument of employee representation rights at board-level in the SE.

Chapter 3- Evaluation of the Functioning of the European Company Statute will be one the core chapters of this research, as it studies the SE and the ECS in depth. In the process, objectives of the ECS will be rationally studied in line of its strengths and weaknesses.

Chapter 4- Lessons from the German Model of Corporate Governance will provide an ideal perspective on the issue of employee involvement by referring to the Germany's corporate governance model, which has been almost unanimously regarded as the model for the rest of EU with respect to works councils and co-determination.²⁷ The chapter will analyse the strengths of employee involvement from Germany's industrial relations system.

Chapter 5- Laissez-Faire approach towards Employee Involvement in the UK will analyse the overall approach of employee involvement in the UK. The rationale for studying UK in this chapter and Germany in the previous chapter is to analyse the jurisdictions which are the opposite extreme ends of the spectrum of national industrial relations system (Germany which has a lot of codetermination options and UK which has none). The hypothesis that UK has adopted a laissez-faire approach

²⁷ E Gaugler and S Wiltz, 'Germany' in C Brewster and others (eds), *Euro-Dean Guide to Human Resource Management* (Academic Press 1992) 163-228.

on the issue of employee involvement will be tested. This will be proved by demonstrating that the Council Directive No 2002/14/EC (hereafter, referred to as the “ICE Directive”)²⁸ has been more widely accepted and effectively implemented in UK as opposed to the acceptance of ECS and its implementation. This is demonstrated by the fact that the UK is more receptive when providing information and consultation to employees, but is abstinent to provide board-level representation rights to employees.

Chapter 6- Case Study: Employee Representation in Selected Member States will comparatively analyse employee involvement and in particular, board-level employee representation with respect to national industrial relations system in Member States and also in relation to the ECS. Since the law of the SE will be based on the underlying Member States law and its national industrial relations system, it will be imperative to study the national industrial relations system and in particular, employee involvement in some detail for the selected Member States and in brief for the rest of the Member States. This comparison will provide for the exploration of adequate and essential conditions for board-level representation rights.

Chapter 7- Reviewing the European Company Statute will draw arguments from *Chapter 3*, which would have already identified the shortcomings of the ECS. On its examination, potential measures which could enhance the application of the SE Directive's provisions will be identified. An analytical conclusion will be sought concentrating on the effectiveness of the ECS.

Also, the case for Czech Republic (the SE haven) will be investigated to ascertain the driving factors for forming the SE.

Chapter 8- The Future of the SE v European Company Law takes a holistic view of European Company Law and its effect on the ECS. Steps that EU legislators must take to amend the ECS so that such legislation promotes an effective working model of board-level employee representation rights will be discussed. EC's consultation process will be critically analysed and potential measures explored, as the

²⁸ Council Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L80.

shortcomings in the ECS consultation process directly affected its viability. The practicability of the SE Directive in terms of cross-border facilitation will be analysed with reference to the Council Directive No 2005/56/EC²⁹ (hereafter, referred to as the "Cross-Border Mergers Directive"). It has been argued that the Cross-Border Mergers Directive may have undermined the position of the ECS.

Lastly, *Chapter 9- Conclusion* will reiterate the main research findings from the previous chapters. It will be confirmed from the analysis and discussions in the previous chapters that employee representation at general level and board-level, along with the directives that regulate it are complex and ambiguous aspects in EU Company Law. The research questions will be simultaneously addressed along with the original contribution to scholarship.

²⁹ Council Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310.

CHAPTER 1- EMPLOYEE INVOLVEMENT IN THE EU'S CORPORATE GOVERNANCE REGIME

1.1 Introduction

This chapter aims to define the ambiguous 'employee representation' in SE, as this term is variably interpreted in different Member States. This is followed by the history of employee involvement in continental Europe and how this idea was transposed in EU Directives since the first debate in the 1960s between the EC and Member States. Lastly, the ECS is discussed briefly to introduce its impact on employee involvement with the SE to provide a background to the thesis. The significant attributes of this chapter are: (i) the need to establish an EU-wide accepted definition of employee involvement, especially employee representation; (ii) to briefly analyse employee involvement, namely circumventing representation rights at national level owing to the 'before and after' principle; the 'freezing' of board-level representation rights; the choice of the board system (monistic or dualistic) structure; and employee involvement rights after the SE has been established.

1.2 Defining employee involvement

So far, the SE Directive has been comprehensible in defining involvement, information, consultation and participation. However, neither the SE nor the ECS contains an explicit definition of employee 'representation'. The definition of participation within the SE Directive does refer to employee representatives in the affairs of a company, with respect to appointment and opposition of members on the supervisory/administrative board, but it is limited in its scope. Furthermore, the actual scope of participation and the meaning it has in different Member States is unclear. It is imperative to have a unanimous EU-wide definition of every term within the area of employee involvement. Such a definition will remove any confusion about the relevant words in the different languages spoken across the EU, and so lessen ambiguity within meetings of the EU organs.

The following table provides the current EU definitions for the various aspects of employee involvement. They are basic rather than comprehensive. For example, in the definition of "involvement", legislators should have explained in more detail how

"employees' representatives may exercise an influence on decisions", as certain provisions within the ECS seem trivial to secure board-level representation rights. The definition of employees' "participation" in the SE Directive is essentially practical, and not conceptual. It seems designed merely to reflect the wide range of established employee involvement mechanisms already in place in Member States. It does not seem to adequately summarise them.

<i>Involvement</i>	<i>Information</i>	<i>Consultation</i>	<i>Participation</i>
Article 2 (h) of the SE Directive: "Involvement of employees, means any mechanism, including information, consultation and participation through which employees' representatives may exercise an influence on decisions to be taken within the company."	Article 2 (i) of the SE Directive: "Information", means the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE on questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State at a time, in a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SE."	Article 2 (j) of the SE Directive: "Consultation, means the establishment of a dialogue and the exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ, which may be taken into account in the decision-making process within the SE."	Article 2 (k) of the SE Directive: "Participation" means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of: - the right to elect or appoint some of the members of the company's supervisory or administrative organ, or - the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ."

Table 1- Definition of employee involvement, information, consultation and participation under the SE Directive

In a theoretically perfect situation, 'employee representation' would mean that employee representatives on the board have equal control with management in the decision-making process. Such a definition would exclude those situations where the number of employee representatives on the board is minimal (in some cases even one-third representation on the board does not suffice) and cannot influence the decision-making process; or where employee representatives are simply influenced to accept predetermined board decisions.

Replacing the word "company" with "European Company (SE)" would clearly indicate that these definitions are only within the scope of the SE Directive and relate only to the SEs. This would limit the freedom for interpretation in different Member States when implementing the SE Directive.

Employee involvement can be categorised under two sub-headings: (i) European works council (EWC); and (ii) board-level employee representation. Employee representation exists in companies at general (as trade union representation) or at board level (as European works council).³⁰ The following table draws a distinction between the two:

<i>Trade unions</i>	<i>European works councils</i>
Charitable association serving its members' interests.	Legally incorporated to represent the interests of all the company's employees.
Achieving collective bargaining agreements (mainly relating to working conditions and compensation).	Influencing decision-making at supervisory/board level.
NB- Employee representation is mainly via trade unions in Italy, Malta, Poland, Finland, Cyprus, Denmark Czech Republic, Latvia, Sweden, Malta, Lithuania and Romania. Also, in UK and Ireland, trade unions are the sole national representative bodies. In Luxembourg, Germany and Austria both works councils and trade unions are not associated at the company level. However, both works councils and trade unions have obligatory collective bargaining agreements or statutory representation rights in Slovakia, Slovenia, Spain, Portugal, The Netherlands, Greece and Hungary.	

*Table 2- Trade unions vs works councils*³¹

EWC remain somewhat dependent on trade unions for legitimacy and maintenance in Member States where they are technically autonomous of trade unions. When EWC are principally run by trade unions, representation of non-union employees will be significantly less.³² Works councils are an important aspect of employee representation, with currently 1057 active EWC in 977 multinational corporations across the EU.³³ An EWC consists of 3 to 30 elected employee members who frequently discuss with the company's management:

"... the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings.

³⁰ Wisskirchen et al., 'Employee representation and codetermination rights in Europe' (2010/2011) 1 Labour and Employee Benefits Handbook.

³¹ Ibid.

³² P Briône and C Nicholson, 'Employee Empowerment- Towards Greater Workplace Democracy' (2012) CentreForum 32-33.

³³ 'Statistics and graphs' (ewcdb) <http://www.ewcdb.eu/statistics_graphs.php> accessed 12 May 2014.

*The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.*³⁴

Board-level employee representatives (who may be elected directly, or indirectly through EWC or trade unions) play a substantial role in corporate governance, with respect to the welfare of employees, management and the company.³⁵ Board-level employee representation in the SE is now considered an integral part of the EU's vision of corporate governance, which considers that the company must not be defined solely by the interests of its shareholders and directors, but also of the broader community of stakeholders.³⁶ Germany provides a prominent example of board-level employee representation (quasi-parity board representation of companies with more than 2000 workers). The company is managed by both employee representatives and directors appointed by the shareholders; decisions are made with a view more to stakeholder value than to shareholder value. The German situation illustrates that board-level worker representation reduces the company-employee agency costs and minimises the board's performance in regulating director-shareholders agency problems.³⁷

1.3 The history of employee involvement and EU Directives

It has been widely suggested that employee involvement in Europe began in the early years of the 20th century, in Germany's Weimar Republic.³⁸ In 1951, the

³⁴ Annex 1, 1(a), Council Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [2009] OJ L122/28.

³⁵ P Bri  ne and C Nicholson, 'Employee Empowerment- Towards Greater Workplace Democracy' (2012) CentreForum 32-33.

³⁶ Rehfeldt et al., 'Employee involvement in companies under the European Company Statute (ECS)' (*Institut de Recherches Economiques et Sociales*, 2010) <www.eurofound.europa.eu/pubdocs/2010/78/en/1/EF1078EN.pdf> accessed 10 May 2014.

³⁷ KJ Hopt, 'The German Two-Tier Board: Experience, Theories, Reforms' in KJ Hopt and E Wymeersch (eds), *Comparative Corporate Governance: Essays and Materials* (Clarendon Press 1998) 225.

³⁸ R Dukes, 'The origins of the German system of worker representation' (2005) 19 *Historical Studies in Industrial Relations* 31-62.

Montan-Mitbestimmungs-gesetz (German co-determination law- board-level representation in its existing form) was established in the iron, coal and steel industries.³⁹ However, there is evidence suggesting that employee participation schemes were introduced originally in UK in the 1860s by philanthropic employers like Henry Briggs and Company; a similar scheme was introduced by the South Metropolitan Gas Company in the 1890s.⁴⁰ The idea did not gain momentum. Marchington et al. rightly cite Poole, who wrote in 'The Origins of Economic Democracy'⁴¹ that the result was an episode of 'harsh industrial relations issues as divisions were created not only between non-union and union labour, but also among the union and union associates at the company'.⁴²

Over a century later, relations between employers and employees have changed again, as a result of 'societal shifts and economic demands'.⁴³ Summers and Hyman point out that:⁴⁴ (i) employees are now more educated, qualified and aware of the economic situation (owing to technology and freedom of information), compared to "older non-qualified staff";⁴⁵ and (ii) the influence of trade unions has considerably declined, along with their membership.⁴⁶ This second point is arguable: Summers and Hyman might have failed to consider the fact that 12 out of 28 Member States have employee representation through trade unions.⁴⁷

Employee involvement has been an EU objective since 1960. The EC justified this objective in terms of the following political objectives:⁴⁸ (i) prohibiting social dumping;

³⁹ A Conchon, *Board-level Employee Representation Rights in Europe- Facts and Trends* (Report 121, ETUI aisbl, Brussels 2011) 7-9.

⁴⁰ Marchington et al., *New Developments In Employee Involvement* (Manchester School of Management UMIST, 1992) Chapter 2, 1.

⁴¹ M Poole, *The Origins of Economic Democracy: Profit Sharing and Employee Share Schemes* (Routledge 1989) 8-14.

⁴² Marchington et al., *New Developments In Employee Involvement* (Manchester School of Management UMIST, 1992) Chapter 2, 1.

⁴³ J Summers and J Hyman, *Employee participation and company performance- A review of the literature* (Joseph Rowntree Foundation 2005) 1.

⁴⁴ Ibid.

⁴⁵ Cully et al., *Britain at Work* (Routledge 1999) 85-96.

⁴⁶ A Wolf, *Does Education Matter?* (Penguin, London 2002).

⁴⁷ Italy, Malta, Poland, Finland, Cyprus, Denmark, Czech Republic, Latvia, Sweden, Malta, Lithuania and Romania.

⁴⁸ B Keller and F Werner, 'New Forms of Employee Involvement at European Level- The Case of the European Company (SE)' (2011) *British Journal of Industrial Relations* 620.

(ii) expanding and securing workers' rights; (iii) promoting participation as a 'productive factor'; and (iv) harmonising company law.

There has been considerable progress at general level with respect to information and consultation, but at board-level it has remain significantly untouched. Since the 1970s, proposed changes were to be made depending upon the escalating scale of resistance.⁴⁹ In 1975, a Green Paper on 'Employee Participation in Company Structure'⁵⁰ proposed to introduce a single standardised model of two-tier corporate governance. Subsequently, after strong opposition, it was proposed that the companies can choose between a one-tier and two-tier model. The proposal disappeared from EC's agenda during the 1980s and early 1990s; the constitution of EWC was the only focus of political interest.⁵¹ The 'Vredeling' Directive⁵², whose prime objective was to provide mandatory information, consultation, and representation of employees at board level in multinational companies, never came into effect due to lack of unanimity, differences of interests and political controversy among EU and domestic corporate actors.⁵³ The directive included proposals about employee representation on the supervisory board and the right to vote for the management board, which was rejected by various Member States as being too rigid⁵⁴ (e.g. UK in the 1980s and 1990s).⁵⁵

EU Directives are of particular interest for all aspects of EU industrial partnership and representation. EU Directives on the transposition process have left ample opportunities for specific national interpretation, and room for political manoeuvring.

⁴⁹ Ibid.

⁵⁰ Commission, 'Employee participation and company structure in the European Community' COM (1975) 150.

⁵¹ A Sorge, 'Mitbestimmung für die Europäische Aktiengesellschaft: Nützliche Lehren aus mehr als dreißig Jahren Seifenoper' in J Beckert and others (eds), *Transformation des Kapitalismus* (Frankfurt, Campus 2006) 249-271.

⁵² The Draft Fifth Company Law Directive- Amendment to the proposal for a Fifth Directive founded on Article 54 of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs' <http://www.mhc.ie/fs/doc/companylaw/eu-company-law/5th_proposal_third_revision.pdf> accessed 16 May 2014.

⁵³ B Keller and F Werner, 'New Forms of Employee Involvement at European Level- The Case of the European Company (SE)' (2011) *British Journal of Industrial Relations* 621.

⁵⁴ S Andreadakis, 'Regulatory Competition vs Harmonization: Is there a third way?' (2008) 6 (2) *International and Comparative Corporate Law Journal* 52.

⁵⁵ M Gold, 'The European Works Council Directive- Changing Rationales of EU Employee Participation' in M Whittall and others (eds), *Towards a European Labour Identity: The Case of the European Works Council* (Routledge 2007) 19-20.

Of course, some aspects of employee involvement are not governed by EU or Member States' legislation, but can be negotiated internally between employees and management.

In total, fifteen EU Directives deal with the above mentioned four rationales for employee involvement, but there are only four main 'social acquis' Directives:⁵⁶ (i) EU Workplace Health and Safety Directive 89/391/EEC;⁵⁷ (ii) Council Directive No 2009/38/EC (hereafter, referred to as the "EWC Directive")⁵⁸ (iii) ICE Directive; and (iv) SE Directive.

The Internet now provides streamlined access to company information, thereby simplifying the disclosure formalities imposed under Council Directive No 2003/58/EC⁵⁹.⁶⁰ Providing information at a general level, ultimately facilitates a flexible work environment, improves a company's risk assessment and promotes trust between the company and the employee.⁶¹ Fauvera and Fuerst note that encouraging employee representation and information output are essential in codetermination.⁶² When a company is performing poorly, they suggest, the employees will be informed about the situation and the company's strategies and losses; as a result, they will be more willing to make concessions and less likely to engage in costly strikes and work stoppages. They also suggest that employee representation and the publication of information will lead to the creation of an

⁵⁶ 'Information and Consultation' (*worker-participation.eu*) <<http://www.worker-participation.eu/EU-Framework-for-I-C-P/Information-and-Consultation>> accessed 16 May 2014.

⁵⁷ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183.

⁵⁸ Council Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [2009] OJ L122/28.

⁵⁹ Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies [2003] OJ L221: this is no longer in force.

⁶⁰ European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS), 'What makes a Good Company? Employee Interest Representation in European Company Law: Reflections and Legal Provisions, Report 94' (2006) <http://www.seeurope-network.org/homepages/seeurope/file_uploads/bedracgoodcomreportr94.pdf> accessed on 12 July 2014.

⁶¹ N Sumra, 'Q&A: Information and Consultation Directive' (2003) <<http://www.personneltoday.com/articles/2003/07/09/19707/qa-information-and-consultation-directive.html>> accessed 12 July 2014.

⁶² L Fauvera and ME Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards' (2006) 82 *Journal of Financial Economics* 673-710.

'information intermediary' between the employees and the company, thereby improving cooperation, teamwork in management and efficiency.⁶³ Employee representation was established as necessary in the European Court of Justice's (ECJ) decision in *Commission of the European Communities v United Kingdom*,⁶⁴ when interpreting Council Directive No 75/129/EEC⁶⁵ and Council Directive No 77/187/EEC⁶⁶.

EU Company Law Directives have encouraged employee representation also as a way of improving the behaviour of company boards. Representation provides an informed board monitor that reduces managerial agency costs (e.g. excessive salaries, perk-taking and shirking) and curtails private block-holder privileges.⁶⁷ A judicious level of employee representation maximises the market value and efficiency of the company⁶⁸ and supplies a reliable channel for information flow to the highest levels of a company, thereby enhancing the board's decision-making abilities.⁶⁹ This enhanced information also makes board decisions more comprehensible. The supervisory board will be able to 'easily identify strategies and curb investments representing personal control benefits to directors/management or majority shareholders by dilution of small investors, asset stripping, pyramiding, simple perquisites and crony capitalism'.⁷⁰

1.4 Employee involvement and the European Company Statute

Among these directives, the SE Directive was legislated to secure employees' involvement rights in company decisions and with a vision to establish a uniform legal framework. This vision has become blurred, because implementation of the

⁶³ Ibid.

⁶⁴ Case C-382/92 *Commission of the European Communities v United Kingdom* [1994] ECR I-2435 and Case C-383/92 *Commission of the European Communities v United Kingdom* [1994] ECR I-2479.

⁶⁵ Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies [1975] OJ L48/29: this is no longer in force.

⁶⁶ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L 61/26: this is no longer in force.

⁶⁷ L Fauvera and ME Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards' (2006) 82 *Journal of Financial Economics* 703.

⁶⁸ But see also, G Gorton and F Schmid, 'Capital, Labor and the Firm: A study of German Codetermination' (2004) 2 *Journal of the European Economic Association* 863-905.

⁶⁹ L Fauvera and ME Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards' (2006) 82 *Journal of Financial Economics* 687.

⁷⁰ Ibid.

legal framework of the ECS has been left to the discretion of Member States where the SE is registered.⁷¹ As a result, there are now 28 different national SE laws.⁷²

The shortcomings of the ECS defeat the fundamental principle of the statute and subvert the right provided under Article 153 of The Treaty on European Union. The legal framework of the ECS, as it stands, fails to secure pre-existing representation rights at board level, but also allows Member States to circumvent representation rights at national level.⁷³ Owing to the 'before and after' principle,⁷⁴ a company is only legally obliged to provide board-level representation rights if these rights were available to employees prior to the formation of the SE.⁷⁵ However, companies in Member States who have no company law provisions for employee representation at board level (e.g. UK and Italy) are not obliged to provide this right to employees in the new SE.

Certain provisions of the ECS are ambiguous. For example, considering the objectives of the ECS and Article 153 of The Treaty on European Union, it is difficult to understand why the ECS provides for 'freezing' of board-level representation rights. A company may already have representation rights in place, but might be reluctant to increase those rights, for example from one-third representation to equal representation, if the required threshold of employee increases. GfK SE, Fresenius SE, Surteco SE are all examples of companies that have frozen board-level representation.

The ECS has also failed to acknowledge issues like employee involvement rights at group level (e.g. prevalent in certain Member States like France- '*comité de*

⁷¹ W Njoya, 'Employee ownership in the European company: reflexive law, reincorporation and escaping codetermination' (2010) Centre for Business Research, University of Cambridge Working Paper No. 416 <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp416.pdf> accessed 6 December 2015

⁷² M Stollt and E Wolters, *Worker involvement in the European Company (SE) - A handbook for practitioners* (ETUI aisbl, Brussels 2011).

⁷³ B Keller and F Werner, 'New Forms of Employee Involvement at European Level- The Case of the European Company (SE)' (2011) *British Journal of Industrial Relations* 620-643.

⁷⁴ 18th Recital of the SE Directive.

⁷⁵ Article 4(4) of the SE Directive (when establishing SE through a conversion).

groupe')⁷⁶. Certain aspects of the SE Directive have been broadly interpreted (Article 4(4) and Part 3(a) Annex) and clarity on the number of employee representatives on the board is required.⁷⁷ Articles 2 to 3 of the Council Regulation (EC) No 2157/2001⁷⁸ (hereafter, referred to as the “SE Regulation”) provides for an SE to set up additional SEs as subsidiaries and this prevalence has threatened employee involvement rights in the SE. The ECS mechanisms for providing employee involvement rights are assured only when SEs are founded. However, when employees have been recruited, it becomes difficult to negotiate employee involvement rights (there are existing examples of involvement rights being legitimately denied to employees when a previously SE company without involvement rights are activated).⁷⁹

A company can use the terms of the ECS to deny their employees any substantial involvement rights. Shareholders can decide in their General Meeting whether to choose a monistic or dualistic board system, in line with Article 38 of the SE Regulation. A company not intending to have substantial employee involvement can simply opt for a monistic board. Employees would have no influence at all in choosing the board structure. Furthermore, employee representatives at board level (monistic or dualistic) cannot prevent or block a disputed board decision if all shareholder representatives act unanimously;⁸⁰ and in the event of a tie where there is equal representation of employee and shareholders representatives, the chairman has a casting vote (per Article 50(2) SE Regulation).

The ECS has thus arguably weakened codetermination rights and allowed for companies to circumvent if not completely evade national employee involvement rights (although this seldom occurs in practice). The ÖGB (the Austrian

⁷⁶ Commission, 'First phase consultation of Social Partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees' COM (2011) 4707.

⁷⁷ Commission, 'Communication from the Commission on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees' COM (2008) 591.

⁷⁸ Council Regulation (EC) 2157/2001 8 October 2001 on the Statute for a European company (SE) [2001] OJ L294.

⁷⁹ Latest Developments (*worker-participation.eu*) <<http://www.worker-participation.eu/Europa-AG-SE/Latest-developments>> accessed on 12 May 2014.

⁸⁰ M Stollt and E Wolters, *Worker involvement in the European Company (SE) - A handbook for practitioners* (ETUI aisbl, 2011).

confederation of trade unions), on the occasion of its 16th federal congress, stressed that:

"...co-determination rights mostly regulated on the national level are in constant danger of being undermined by the on-going integration process and a unilateral understanding of European fundamental freedoms. The increasing Europeanisation of company law continues to be a particular challenge for this pillar of our social model', which led the ÖGB to demand to make 'the principle of co-determination a characteristic feature of participatory democracy into a guiding principle of European policies'".⁸¹

Two further claims may be made. First, the ICE Directive has been drafted very broadly, thereby creating a very general framework for consultation and information, without harmonising representation;⁸² as a result, Member States have considerable scope to implement its terms. Secondly, European Trade Union Confederation scholars claim that, if the EC's proposal for the establishment of the European Private Company (SPE) takes effect, companies could use it to circumvent national rules on employee involvement⁸³ by:

"allowing companies to escape the statutory board-level employee representation regime by choosing to register in a country without an equivalent (in the case of an SPE created ex-nihilo)".⁸⁴

The evidence suggests that the EU's corporate governance model prioritises the interests of shareholders. However, the financial crisis in the last decade has opened a window on the shortcomings of this 'shareholder value' model.⁸⁵ The concept of a

⁸¹ 'Resolution, International Affairs and EU policy' (ÖGB 16th Federal Congress of the Austrian Trade Union Federation, 2007) <http://www.oegbeu.at/servlet/ContentServer?pagename=S05/Page/Index&n=S05_15> accessed on 17 May 2014.

⁸² Latest Developments (*worker-participation.eu*) <<http://www.worker-participation.eu/Europa-AG-SE/Latest-developments>> accessed on 12 May 2014.

⁸³ Ibid.

⁸⁴ A Conchon, *Board-level Employee Representation Rights in Europe- Facts and Trends* (Report 121, ETUI aisbl, 2011) 7-9.

⁸⁵ About the SEEurope network (*worker-participation.eu*) <<http://www.worker-participation.eu/European-Company-SE/SEEurope-network>> accessed on 11 May 2014.

'sustainable company'⁸⁶ model of corporate governance, emphasising the need to give employees a voice and generate 'stakeholder value', has gained much acceptance among scholars. This model can be considered as a supplement to the 'stakeholder value' model or the German corporate governance model (which have a two-tiered board structure comprised of a supervisory and a management board). This research advocates that employee representation at board level is fundamental for the progress of European corporate governance. It is controversially argued that there is currently no clear evidence of the correlation between board-level employee representation and a company's economic performance.

EU legislators claim that employee involvement directives are substantial in contributing to social welfare in the EU, and the legislators are promoting the employee involvement aspects (especially representation). However, the writer is of opinion that the relevance of these directives (e.g. the SE Directive) are questionable. One might argue them to be "optional, market-mimicking, unimportant, or avoidable...and there is nothing nontrivial that EC corporate law requires, forbids, or enables."⁸⁷

As the EU legislation provides for the restriction of the scope of directives, they are usually under-enforced and have been said to have no substantial effect on EU and Member States' Company Law; fail to govern important issues; and 'construed and invoked in varied Member States per their local legal culture and usually in conformation with pre-existing corporate law'.⁸⁸ For example, the SE Directive simply serves to regulate an elemental framework, but the comprehensive legal principles are left to the discretion of the Member States with the registered SE.⁸⁹ Similarly, with respect to the ICE Directive⁹⁰, Member States have the autonomy to implement

⁸⁶ Idea developed by ETUI researchers- Norbert Kluge and Sigurt Vitols.

⁸⁷ L Enriques, 'EC Company Law Directives And Regulations: How Trivial Are They?' (2006) 27 (1) University of Pennsylvania Journal of International Law 2, 44.

⁸⁸ Ibid, 2-78.

⁸⁹ W Njoya, 'Employee ownership in the European company: reflexive law, reincorporation and escaping codetermination' (2010) Centre for Business Research, University of Cambridge Working Paper No. 416 <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp416.pdf> accessed 6 December 2015.

⁹⁰ Council Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L80.

the information and consultation procedure most befitting to pre-existing customs, labour market systems and industrial relations systems.⁹¹

⁹¹ C Barnard, *EC Employment Law* (4th edition, Oxford University Press, Oxford 2012) 736.

CHAPTER 2- JUSTIFYING EMPLOYEE INVOLVEMENT IN CORPORATE GOVERNANCE

2.1 Introduction

Employee involvement is a recognised European fundamental right under Article 153 of The Treaty on European Union, which states that the 'Union will encourage employee information, consultation, representation and co-determination within the Member States'. Additionally, Article 27 of the Charter of Fundamental Rights of the European Union⁹² enshrines employee involvement as an elemental right with respect to information and consultation. This chapter explores all possible rationales that designate this importance in EU Member States to employee involvement.

The issue of employee involvement in corporate governance is best studied under company law. However, given the financial crisis of 2007-2008, it will be unfair to ignore corporate governance reform as a labour law subject. Company law and labour law are justifiably branched between economic and social objectives. Company law is more concerned with the relationship between shareholders and managers, and economic issues. Labour law focuses on contributing to the social welfare and objectives of the employees and their relationship with the employers.⁹³ Villiers notes that EU Directives are more apt to be classified as economic / single market legislation in company law, and as social provisions in labour law.⁹⁴

One of the foremost dialogues on employee involvement by EU legislators emphasised the following rationale: from a socio-legal standpoint, employee involvement cultivates social democracy and is a good corporate governance practice.⁹⁵ From an economic standpoint, legislators regarded employee representation as a way of promoting information exchange, decreasing transaction costs and negotiating a course through changed scenarios. The political rationale behind the establishment of involvement policies is consequently to develop national

⁹² [2016] OJ C202.

⁹³ B Bercusson, 'Workers, Corporate Enterprise and the Law' in R Lewis (ed), *Labour Law in Britain* (Blackwell 1986) 144.

⁹⁴ C Villiers, *European Company Law – Towards Democracy?* (Ashgate Publishing 1998) 188-189.

⁹⁵ Commission, 'Employee participation and company structure in the European Community' COM (1975) 150.

economic efficiency whilst improving the work experience. These rationales are now arguably embedded and reflected in the EU's corporate governance and social agenda culture today, but are not exhaustive and only represent the principally discussed reasons to encourage employee involvement.

2.2 Investigating prior research findings

No unanimous consensus yet has been reached as to whether employee involvement is advantageous, detrimental or neutral in good corporate governance, especially within the SE, despite numerous research attempts. One of many reasons behind this lack of agreement is that these researches are conducted in different economic climates, making it difficult to establish a clear correlation between employee involvement and good corporate governance. For example, the issue of employee involvement was much more restricted in the EU between the 1960s and 1990s, when nearly all proposals for board-level employee representation would eventually be rejected by a majority of Member States.

The following tables classify notable studies undertaken to date according to the outcome of their findings:

<i>Studies concluding advantageous effect of employee involvement</i>
Employee involvement in the board vs. company's efficiency (Balsmeier et al. (2011)) ⁹⁶
Employee involvement in the board vs. company's profit and yield, where the employee representation is one-third of the board composition (Boneberg (2010)) ⁹⁷
Employee involvement in the board vs. company's efficiency (Debus (2010)) ⁹⁸
Employee involvement in the board vs. company's efficiency with respect to awarding dividends and market value (Fauver and Fuerst (2006))
Employee involvement in the board vs. company's productivity, where the employee representation is equal of the board composition (FitzRoy and Kraft (2005)) ⁹⁹
Employee involvement in the board vs. market value of the company and bookkeeping (Frick and Bermig (2009)) ¹⁰⁰
Employee involvement in the board vs. board composition (Gerum and Debus (2006)) ¹⁰¹
Employee involvement in the board vs. company's profitability (Gurdon and Rai (1990)) ¹⁰²
Employee involvement in the board vs. company's efficiency (Hollandts et al. (2009)) ¹⁰³
Employee involvement in the board vs. company innovation, where the employee representation is one-third of the board composition (Kraft and Stank (2004)) ¹⁰⁴
Employee involvement in the board vs. equity return, where the employee representation is one-third of the board composition (Kraft and Ugarkovic (2006)) ¹⁰⁵
Employee involvement in the board vs. company's profit and yield, where the employee representation is one-third of the board composition (Renaud (2007)) ¹⁰⁶
Employee involvement in the board vs. company's efficiency (Strom (2007)) ¹⁰⁷

⁹⁶ Balsmeier et al., 'Corporate Governance and Employee Power in the Boardroom. An Applied Game Theoretical Analysis' (2011) Diskussionspapier des Instituts für Organisationsökonomik 9/2011 <<https://134.245.92.14/dspace/bitstream/10419/50009/1/669146242.pdf>> accessed 2 October 2015.

⁹⁷ F Boneberg, 'The Economic Consequences of one-third Co-determination in German Supervisory Boards: First Evidence for the Service Sector from a New Source of Enterprise Data' (2010) University of Lüneburg Working Paper Series in Economics 177 <http://www.leuphana.de/fileadmin/user_upload/Forschungseinrichtungen/ifvwl/WorkingPapers/wp_177_Upload.pdf> accessed 11 November 2014.

⁹⁸ M Debus, *Evaluation des Aufsichtsrats: Theoretische Grundlagen und empirische Befunde* (Springer Gabler 2010).

⁹⁹ F FitzRoy and K Kraft, 'Co-Determination, Efficiency and Productivity' (2005) 43 (2) British Journal of Industrial Relations 233-247.

¹⁰⁰ B Frick and A Bermig, 'Mitbestimmung und Unternehmensperformance: Der Einfluss von Arbeitnehmervertreter im Aufsichtsrat auf Unternehmenswert und operative Entwicklung' (2009) University of Paderborn Working Paper University of Paderborn <<http://www.fes.de/wiso/pdf/abp/2010/251010/governance-und-performance-fes.pdf>> accessed 18 November 2014.

¹⁰¹ E Gerum and M Debus (2006) Die Größe des Aufsichtsrats als rechtspolitisches Problem – Einige empirische Befunde. Zwischenbericht, Düsseldorf: Hans-Böckler Foundation. <http://www.boeckler.de/pdf_fof/S-2004-650-2-1.pdf> accessed 22 November 2014.

¹⁰² M Gurdon and A Rai, 'Codetermination and Enterprise Performance: Empirical Evidence from West Germany' (1990) 42 (4) Journal of Economics and Business 289-302.

¹⁰³ Hollandts et al., 'Représentation du travail au conseil d'administration et performance de l'entreprise: une étude empirique sur le SBF 250 (2000-2005)', in MN Auberger and A Conchon (eds) Les administrateurs salariés et la gouvernance d'entreprise (La documentation Française, coll. Les études 2009) 93-101.

¹⁰⁴ K Kraft and J Stank, 'Die Auswirkungen der gesetzlichen Mitbestimmung auf die Innovationsaktivität deutscher Unternehmen' (2004) 3 Schmollers Jahrbuch 421-449.

¹⁰⁵ K Kraft and M Ugarkovic, 'Gesetzliche Mitbestimmung und Kapitalrendite' (2006) 226 (5) Jahrbücher für Nationalökonomie und Statistik 588-604.

¹⁰⁶ S Renaud, 'Dynamic Efficiency of Supervisory-Board-Codetermination in Germany' (2007) 21 (4-5) Labour 689-712.

<i>Studies concluding advantageous effect of employee involvement</i>
Employee involvement in the board vs. positive bookkeeping (Vulcheva (2008)) ¹⁰⁸
Employee representation on the board in companies perform 17% better vs. companies lacking board level employee representation (Workplace Representation and Participation Survey Research, UK) ¹⁰⁹

Table 3- Advantageous effect of employee involvement

¹⁰⁷ Ø Strøm, 'Better Firm Performance with Employees on the Board? Not in the Long Run'(SSRN Paper, 2007) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=967445> accessed 19 October 2014.

¹⁰⁸ M Vulcheva, *Employee Representation and the Management of Earnings* (Mimeo, Goizueat Business School, Emory University 2008).

¹⁰⁹ 'Workplace Employment Relations Study' (GOV.UK, 2013) <<https://www.gov.uk/government/collections/workplace-employment-relations-study-wers>> accessed on 2 October 2014.

<i>Studies concluding detrimental effect of employee involvement</i>
Employee involvement in the board vs. company's efficiency (Bohren and Strom (2005, 2010)) ¹¹⁰
Employee involvement in the board vs. company's productivity and profitability, where the employee representation is one-third of the board composition (Boneberg (2010)) ¹¹¹
Employee involvement in the board vs. company's productivity and profitability, where the employee representation is equal of the board composition (FitzRoy and Kraft (1993)) ¹¹²
Employee representation on the board in companies vs. company's efficiency (Ginglinger et al. (2011)) ¹¹³
Equal employee representation on the board in companies' trade at a discount of 31% vs. companies comprising of one-third employee representation on the board-level (Gorton and Schmid (2000, 2004)) ¹¹⁴
Employee representation on the board in companies vs. company's profitability (Gurdon and Rai (1990)) ¹¹⁵
Employee involvement in the board vs. stock price, where the employee representation is equal of the board composition (Petry (2009)) ¹¹⁶
Employee involvement in the board vs. shareholder value, where the employee representation is equal of the board composition (Schmid and Seger (1998)) ¹¹⁷
Employee involvement in the board vs. employment development (Werner and Zimmermann (2005)) ¹¹⁸

Table 4- Detrimental effect of employee involvement

¹¹⁰ Ø Bøhren and Ø Strøm, 'The value-creating board: Theory and evidence' (Oslo: BI Norwegian School of Management, Research Report No 8, 2005)
<http://finance.bi.no/~bernt/governance/Report_Boards.pdf> accessed 8 December 2014.

¹¹¹ F Boneberg, 'The Economic Consequences of one-third Co-determination in German Supervisory Boards: First Evidence for the Service Sector from a New Source of Enterprise Data' (2010) University of Lüneburg Working Paper Series in Economics 177
<http://www.leuphana.de/fileadmin/user_upload/Forschungseinrichtungen/ifvwl/WorkingPapers/wp_177_Upload.pdf> accessed 11 November 2014.

¹¹² F FitzRoy and K Kraft, 'Economic Effects of Codetermination' (1993) 95 (3) The Scandinavian Journal of Economics 365-375.

¹¹³ E Ginglinger, W. Megginson and T Waxin, 'Employee ownership, board representation, and corporate financial policies' (2011) 17 (4) Journal of Corporate Finance 868-887.

¹¹⁴ G Gorton and F Schmid, 'Universal Banking and the Performance of German Firms' (2000) 58 (1) Journal of Financial Economics 29-80.

¹¹⁵ M Gurdon and A Rai, 'Codetermination and Enterprise Performance: Empirical Evidence from West Germany' (1990) 42 (4) Journal of Economics and Business 289-302.

¹¹⁶ S Petry, 'The Wealth Effects of Labor Representation on the Board- Evidence from German Codetermination Legislation' (2009) UCLA Anderson School of Management Working Paper
<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.175.6841&rep=rep1&type=pdf>> accessed 11 November 2014.

¹¹⁷ F Schmid and F Seger, 'Arbeitnehmermitbestimmung, Allokation von Entscheidungsrechten und Shareholder Value' (1998) 68 (5) Zeitschrift für Betriebswirtschaft 453-473.

¹¹⁸ JR Werner and J Zimmermann, 'Unternehmerische Mitbestimmung in Deutschland: Eine empirische Analyse der Auswirkungen von Gewerkschaftsmacht in Aufsichtsräten' (2005) 12 (3) Industrielle Beziehungen 339-354.

<i>Studies concluding neutral effect of employee involvement</i>
Employee involvement in the board vs. industry-level share price, where the employee representation is equal of the board composition (Baums and Frick (1998)) ¹¹⁹
Employee involvement in the board vs. company's profitability (Benelli et al. (1987)) ¹²⁰
Employee involvement in the board vs. company's productivity and profitability, where the employee representation is equal of the board composition (FitzRoy and Kraft (1993)) ¹²¹
Employee involvement in the board vs. market value of the company and bookkeeping (Frick and Bermig (2009)) ¹²²
Employee involvement in the board vs. company's efficiency (Ginglinger et al. (2011)) ¹²³
Employee involvement in the board vs. price cost margin, where the employee representation is equal of the board composition (Kraft (2001)) ¹²⁴
Employee involvement in the board vs. company innovation, where the employee representation is equal of the board composition (Kraft, Stank and Dewenter (2010)) ¹²⁵
Employee involvement in the board vs. industrial sectors productivity (Svejnar (1982)) ¹²⁶
Employee involvement in the board vs. company's efficiency, where the employee representation is equal of the board composition (Vitols (2006)) ¹²⁷
Employee involvement in the board vs. company's efficiency, where the employee representation is equal of the board composition (Vitols (2008)) ¹²⁸
Employee involvement in the board vs. company's efficiency, productivity and profitability, where the employee representation is one-third of the board composition (Wagner (2009)) ¹²⁹

Table 5- Neutral effect of employee involvement

¹¹⁹ T Baums and B Frick, 'Codetermination in Germany: The Impact of Court Decisions on the Market Value of the Firm' (1998) 1 (2) *Economic Analysis* 143-161.

¹²⁰ Benelli et al., 'Labor Participation in Corporate Policymaking Decisions: West Germany's Experience with Codetermination' (1987) 60 (4) *Journal of Business* 553-575.

¹²¹ F FitzRoy and K Kraft, 'Economic Effects of Codetermination' (1993) 95 (3) *The Scandinavian Journal of Economics* 365-375.

¹²² B Frick and A Bermig, 'Mitbestimmung und Unternehmensperformance: Der Einfluss von Arbeitnehmervertreter im Aufsichtsrat auf Unternehmenswert und operative Entwicklung' (2009) University of Paderborn Working Paper University of Paderborn <<http://www.fes.de/wiso/pdf/abp/2010/251010/governance-und-performance-fes.pdf>> accessed 18 November 2014.

¹²³ Ginglinger et al., 'Employee ownership, board representation, and corporate financial policies' (2011) 17 (4) *Journal of Corporate Finance* 868-887.

¹²⁴ K Kraft, 'Codetermination as a strategic advantage?' (2001) 19 (3-4) *International Journal of Industrial Organization* 543-566.

¹²⁵ Kraft et al., 'Co-determination and innovation' (2010) 35 (1) *Cambridge Journal of Economics* 145-172.

¹²⁶ J Svejnar, 'Codetermination and Productivity: Empirical Evidence from the Federal Republic of Germany' in D Jones and J Svejnar (eds) *Participatory and Self-Managed Firms* (Lexington Press 1982) 199-212.

¹²⁷ S Vitols, 'Ökonomische Auswirkungen der paritätischen Mitbestimmung: Eine ökonometrische Analyse' (*DGB*, 2006) <https://www.dgb-bestellservice.de/besys_dgb/pdf/DGB70002.pdf> accessed 22 November 2014.

¹²⁸ S Vitols, 'Beteiligung der Arbeitnehmervertreter in Aufsichtsratsausschüssen' (2008) Hans- Böckler Foundation Working Paper 163 <http://www.boeckler.de/pdf/p_arbp_163.pdf> accessed 22 November 2014.

¹²⁹ J Wagner, 'One-Third Codetermination at Company Supervisory Boards and Firm Performance in German Manufacturing Industries: First Direct Evidence from a New Type of Enterprise Data' (2009) IZA Discussion Paper 4352 <<http://core.ac.uk/download/pdf/6470334.pdf>> accessed 10 October 2014.

It is interesting to note that most of the above-mentioned studies are German, based on Germany's experience of employee involvement. This can be attributed to the fact that Germany has the most experience of employee representation in Europe. Further, most literature on employee involvement is in the German language, making it difficult for non-German-speaking researchers to gain access to the vast amount of information already gathered. Historically, the issue of employee involvement was an ideological debate of varied perspective from trade unions, directors or shareholders. The debate in recent times has used advanced methodologies to assess the effect of employee involvement on a company's productivity, efficiency, market value, bookkeeping, industry-level share price, profitability, and corporate governance. Nonetheless, the findings of past and current studies on employee involvement are almost equally split between regarding it as advantageous, detrimental or neutral.

When the introduction of the 'Vredeling' Directive (Draft Fifth Company Law Directive) was being debated, Alchian and Demsetz's conventional investigation suggested that a company is more productive when the entire management rests with the owners of the company (one agent).¹³⁰ According to them, the owner monitors employees more closely when they are paid a competitive salary, and since the owners are the residual claimants this will have resourceful incentives. When employees are paid a competitive salary, the owner monitors them more closely, and, since the owner is the residual claimant, they are motivated to manage their resources more closely. However, by 'involving employees in a company's affairs or granting board level representation, this idea is blurred and disrupted as property rights are divided between two different agents who have dissimilar agendas'.¹³¹ Fauver and Fuerst note that Alchian and Demsetz's analysis is overly simplistic i.e. though in the 'neoclassical firm, employees lack firm-specific skills... eventually they cultivate firm-specific human capital (like owners, they make investments as well)...and since human capital investments are nonconvertible, employees may fear future opportunism; undeniably, returns (e.g. wages) on human capital investments proportionate with investment may never happen'.¹³²

¹³⁰ A Alchian and H Demsetz, 'Production, information costs and economic organization' (1972) 62 American Economic Review 777-795.

¹³¹ L Fauvera and ME Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards' (2006) 82 Journal of Financial Economics 673-710.

¹³² Ibid.

The Draft Fifth Company Law Directive was opposed and rejected by Member States on the ground that introducing employee involvement in a company's affairs would damage shareholder value. The studies mentioned in *Table 4- Detrimental effect of employee involvement* argue that employee involvement posed an impediment to investors, therefore an aspect demonstrating and encouraging ownership concentration.¹³³ On the other hand, Parkinson and Kelly argue that the separation of controlling rights between employees and shareholders makes it uncertain to whom the directors are accountable.¹³⁴ One could respond by asking why directors cannot be held accountable to both employees and shareholders.

The current literature on the issue is sparse and the rationales identified focus more on economic analysis rather than legal analysis. Keller and Werner submit that board-level worker representation has 'still remained principally, along with other issues of workers and information at a general level.'¹³⁵ Although, the SE Regulation and the SE Directive have brought substantial reforms and seek to promote social and economic integration, it is arguably new in its approach and has many 'striking similarities' with the present EWC Directive.

2.3 Arguing for employee involvement: The social welfare rationale coherent argument for employee involvement

The academic rationale with respect to employee involvement is that EU Company Law can be used as a tool and be a great contribution to social welfare whilst simultaneously enhancing a company's economic value as a result. In terms of EU perspective on social rationale, it can be argued that a Member State's Company Law may be more inclined to serve shareholder value. However, EU Company Law is extensive in taking into account the stakeholders' interests and protecting weaker parties, such as the employees. It has been widely suggested and accepted that EU Company Law Directives have been used as an instrument to contribute greatly

¹³³ G Jackson, 'Employee Representation in the Board Compared: A Fuzzy Sets Analysis of Corporate Governance, Unionism and Political Institutions' (2005) 12 (3) *Industrielle Beziehungen* 7-11.

¹³⁴ J Parkinson and G Kelly, 'The Conceptual Foundations of the Firm' in Parkinson and others (eds), *The Political Economy of the Company* (Hart Publishing 2001).

¹³⁵ B Keller and F Werner, 'New Forms of Employee Involvement at European Level- The Case of the European Company (SE)' (2011) *British Journal of Industrial Relations* 1-24.

towards social welfare ('social welfare' in this context meaning the welfare of the employees), but this is highly debatable. Nonetheless, the EU is heightening its social role along with its strategy to achieve top economic power. EU legislators apparently indicated with the introduction of the SE Directive that they are bearing the path of social welfare by recognising the rights of few stakeholders, although primarily protecting weaker parties' rights and reinforcing elemental but often neglected aspects, such as, employees' information at a general level and board-level representation.

Most social welfare aspects such as equal opportunities, equal pay, working time etc. have witnessed staunch challenges, but board-level employee representation still remains largely ignored besides other matters of employees and information at a general level.¹³⁶ There were several propositions for directives that would enhance neglected representation and information rights which never saw the light of the day.¹³⁷ For example, The Draft Fifth Company Law Directive / 'Vredeling' Directive which incorporated proposals about employee representation at the board level and the voting rights for the managerial board was rejected by several Member States. This was mainly owing to decades of differences of interests and political disharmony among domestic corporate actors within the EU. Member States found the suggested proposals and social welfare provisions too rigid.¹³⁸ One such example at the time was the Conservative Government in the UK in the 1980's and 1990's which inflexibly opposed all aspects of employee participation.¹³⁹

One might argue that the SE Directive and the SE Regulation have brought about and promote significant social integration, but it has been widely suggested that it is replicating the present EWC Directive in many ways.¹⁴⁰ From the perspective of management and corporate governance, it is fair to say that not all of their initiatives

¹³⁶ B Keller and F Werner, 'New Forms of Employee Involvement at European Level- The Case of the European Company (SE)' (2011) *British Journal of Industrial Relations* 1-24.

¹³⁷ O Sandrock and J du Plessis, 'The German corporate governance model in the wake of company law harmonisation in the European Union' (2005) 26 (3) *Company Lawyer* 88-95.

¹³⁸ S Andreadakis, 'Regulatory Competition vs Harmonization: Is there a third way?' (2008) 6 (2) *International and Comparative Corporate Law Journal* 52.

¹³⁹ M Gold, 'The European Works Council Directive- Changing Rationales of EU Employee Participation' in M Whittall and others (eds), *Towards a European Labour Identity: The Case of the European Works Council* (Routledge, Oxon 2007) 19-20.

¹⁴⁰ B Keller and F Werner, 'New Forms of Employee Involvement at European Level- The Case of the European Company (SE)' (2011) *British Journal of Industrial Relations* 1-24.

have undeviating economic benefits as their exclusive agenda.¹⁴¹ In contrast to many management motivations for introducing employee involvement, socially-centred efforts also emphasise democratic relationships between employees, and between management and employees (e.g. co-operatives).¹⁴² Social rationales have been, and continue to be, debated on numerous grounds.

2.3.1 *Dignity and equality*

A company's conventional structure and strategy regards employees as nameless and dispensable human resources that are to be managed with the objective of corporate profit in mind. However, the advocates for morality and ethics emphasise that employees have intrinsic value and deserve to be treated fairly and with dignity. These two contrasting objectives have been the subject of debate since the establishment of the first corporation, as corporations have faced resolute challenges to respect the autonomy and dignity of employees.¹⁴³ An employee spends a minimum of one-third of their adult lives working, and undoubtedly their work experience shapes their personality and life outside their work. The working environment and conditions are key factors in defining employees as individuals and in establishing their social worth. Therefore, it is fairly rationalised that employees must have certain representation or voice in their governance and management.¹⁴⁴ McCall notes that the idea of employee involvement rights draws on contemporary western ethical norms that recognise a commitment to employees' equal dignity:

"While no social system could guarantee that all the interests of its members are accommodated, the commitment to equality requires that decisions affecting important or basic interests, be made fairly. What more effective guarantee of fairness and accountability could there be than allowing workers to represent their own interests in the decision-making process? ... the mechanism of participation

¹⁴¹ P Osterman, 'How common is workplace transformation and who adopts it?' (1994) 47 *Industrial Relations and Labor Relations Review* 173-188.

¹⁴² J Summers and J Hyman, *Employee participation and company performance: A review of the literature* (Joseph Rowntree Foundation 2005).

¹⁴³ JJ McCall, 'Employee Voice in Corporate Governance: A Defense of Strong Participation Rights' (2001) 11 (1) *Business Ethics Quarterly* 197.

¹⁴⁴ R Dahl, *A Preface to Economic Democracy* (University of California Press 1985).

must provide real authority...employees deserve an amount of authority that enables them to resist policies that unfairly damage their interests."¹⁴⁵

2.3.2 Social rationale and the unions

Employee involvement initiatives that depend on union support are also an important aspect of the social rationale (for example, management/employee buyouts). Such involvement initiatives are mostly the consequence of negotiations between management and the trade unions, thereby combining social and economic rationales. For example, in the UK, employee buyouts have been set up as Employee Stock Ownership Plans (ESOP).

Not all researchers accept that employee buyouts are in a company's best interests. In the UK, employee buyouts in their modern form have been recognised as ESOP.¹⁴⁶ In the past decade, this type of 'social participation has demonstrated to be comparatively short-lived and uncertain' (e.g. most ESOPs have resorted to conventional ownership).¹⁴⁷ Pencavel argues that this is clear evidence of a traditional dilemma: employee involvement schemes eventually 'degenerate' into conventional ownership.¹⁴⁸ Jensen and Meckling also strongly maintain that a self-governing firm involving employee participation will unvaryingly flounder and will eventually deteriorate into a traditionally controlled firm.¹⁴⁹

Sometimes employee participation schemes are introduced either by a union's demands or as a management's initiative to secure jobs, but it is often seen that economic demands take over the social agenda, subsequently causing the company's shutdown or takeover by another company.¹⁵⁰ It is herein argued that to mitigate this employee involvement which is fairly seen as an obstacle in the UK, union's involvement without ownership is categorised as a social partnership programmes. This is also encouraged by the government participation policies, and

¹⁴⁵ JJ McCall, 'Employee Voice in Corporate Governance: A Defense of Strong Participation Rights' (2001) 11 (1) Business Ethics Quarterly 197.

¹⁴⁶ A Pendleton, *Employee Ownership, Participation and Governance* (Routledge 2001).

¹⁴⁷ Ibid.

¹⁴⁸ J Pencavel, *Worker Participation*. (Russell Sage Foundation 2001).

¹⁴⁹ MC Jensen and WH Meckling, 'Rights and production functions: an application to labour-managed firms and co-determination' (1979) 52 (4) Journal of Business 469-506.

¹⁵⁰ J Summers and J Hyman, *Employee participation and company performance: A review of the literature* (Joseph Rowntree Foundation 2005).

both the Trades Union Congress (TUC) and the Confederation of British Industry (CBI) support these programmes, as they incorporate social as well as economic rationales.¹⁵¹

Employee involvement is an indispensable aspect of the 'European Social Model'¹⁵² which sustains economic competition among the SEs and other companies.

However, there is a lack of unanimity regarding social welfare proposals among Member States, because EU legislators are projections of each Member State's interests. For this reason, EU legislators have not fully been achieving social welfare objectives; it took almost four decades for employee interests to be legislated finally in the form of ECS (as previously mentioned in *Chapter 1- Employee Involvement in the EU's Corporate Governance Regime*). Even if it is accepted that EU legislators are moving in the direction of social welfare and genuinely represent the interests of employees, and EU Directives do in fact contribute towards social welfare, the significance of the EU Directive itself is questionable. Enriques describes Corporate Law Directives in the EU as 'discretionary, market-mimicking, trivial, or avoidable'.¹⁵³

These Directives seem to have no great impact on national company laws or the way the SEs or other companies and corporations are administered or governed. This is attributed to the fact that EU Corporate Law Directives are under-enforced (option to limit the scope of the directives); they cover peripheral matters and core areas of fiduciary duties and shareholder remedies and board-level employee representation are regulated only marginally; and lastly, owing to inconsistent judicial interpretation by the ECJ, these directives are enforced variably in each Member State per their native legal traditions and persistently with pre-existing provisions in corporate law.¹⁵⁴ For instance, the ICE Directive¹⁵⁵ provides Member States with the independence to implement and adopt information and consultation measures appropriate to their prevailing traditions, labour market systems and industrial

¹⁵¹ J Summers and J Hyman, *Employee participation and company performance: A review of the literature* (Joseph Rowntree Foundation 2005).

¹⁵² Article 138-139 of The Social Chapter of the EU Charter.

¹⁵³ L Enriques, 'EC Company Law Directives and Regulations: How Trivial Are They?' (2006) 27 (1) University of Pennsylvania Journal of International Law 2-78.

¹⁵⁴ Ibid.

¹⁵⁵ Council Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L80.

relations arrangements.¹⁵⁶ Likewise, the SE Directive¹⁵⁷ provides only a general framework for SE's governance in their registered Member State, because comprehensive procedures of law are left at each Member State's discretion.¹⁵⁸ Owing to objections like these, an in-depth public consultation in 2012 on the prospects for EU Company Law, and to adopt more suitable mechanisms to meet existing societal, employee, social and economic needs was launched.¹⁵⁹ Three years after this consultation closed,¹⁶⁰ progress is yet to be seen.

2.4 Embedding employee involvement in the EU's corporate governance model

The 2008 economic crisis highlighted the shortcomings within the shareholder value corporate governance structure and ignited the need to promote employee involvement within corporate governance. Until this point, corporate governance arguments had concentrated upon bolstering the position of shareholders. The shareholder model of corporate governance had selfishly been one-sided serving short-term shareholders' interests (share value). This model disregarded the interests of other stakeholders, including employees. This inadvertently affects the company's future prospects and a company's social responsibility. A company's economic success within a Member State depends on a variety of factors, not least employee involvement.

However, it is largely evident from studies mentioned in *Table 3- Advantageous effect of employee involvement*, that companies within Member States¹⁶¹ with employee involvement rights are more successful on a range of measures than those in Member States¹⁶² without employee involvement rights. While this is not

¹⁵⁶ C Barnard, *EC Employment Law* (4th edn, Oxford University Press 2012) 736.

¹⁵⁷ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294/22.

¹⁵⁸ W Njoya, 'Employee ownership in the European company: reflexive law, reincorporation and escaping codetermination' (2011) 11 (2) *Journal of Corporate Law Studies* 267-298.

¹⁵⁹ 'European Company Law: What way forward?' (*European Commission*, 2012)

<http://europa.eu/rapid/press-release_IP-12-149_en.htm> accessed 8 December 2014.

¹⁶⁰ 'Your Voice: DIGIT-IPM' (*European Commission*)

<<http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=companylaw2012>> accessed 8 September 2014.

¹⁶¹ Denmark, Austria, France, Germany, Greece, Luxembourg, Sweden, the Netherlands and Finland.

¹⁶² UK, Belgium, Bulgaria, Slovenia, the Czech Republic, Latvia, Romania, Ireland, Italy, Lithuania, Latvia, Estonia, Slovakia, Poland, Portugal, Hungary, Romania, Slovakia, Malta, Slovenia, Cyprus and Belgium.

directly evident, employee involvement contributing positively to the success of a company should not be ignored. Employees' interests are connected with the longstanding interests of the company; the board benefits from employee opinion, which supports them in their decision-making. This is contrary to the interim economic logistics, which ultimately fail.¹⁶³ Simultaneously, if employees' interests are well accounted for in a company's decisions and employees are evenly represented on the board, then it will improve the quality of employees thus increasing the firm's performance, i.e. productivity. Employee representatives on the board have extensive knowledge about the inner functioning of a company and subsequently, during board decision-making, these representatives can enrich operational and tactical dialogue.

It is also logically viable that employee involvement in a company's decision-making will substantially reduce company costs. Employee involvement in work-related matters can delay or prevent quits from the workplace and promote a reduced absence rate. Share schemes have been found to reduce employee turnover¹⁶⁴ and a reduction in employee turnover will reduce a company's recruitment and training budget.¹⁶⁵ A lower absence rate will subsequently be a cost saving factor for the company. An employee-management relationship prevents industrial feuds and leads to swifter acceptance and implementation of a company's policies and changes. An abundance of empirical evidence demonstrates that employee involvement can: (i) enrich decision-making quality by widening the contributions made by employees on the matter in question; (ii) encourage commitment to the conclusions of the management's decision-making; (iii) develop communication, motivation and cooperation in the workplace; (iv) potentially reduce supervisors' workload; (v) encourage skill development; and (vi) enhance employer-employee relations, thereby reducing strikes and union intervention.¹⁶⁶ Markey submits that 'the power-sharing debate was more prevalent four or five decades ago, but firm

¹⁶³ For example, 2008 economic crisis.

¹⁶⁴ N Wilson and M Peel, 'The impact of profit-sharing, worker participation, and share ownership on absenteeism and quits: some UK evidence' in G Jenkins and M Poole (eds), *New Forms of Ownership* (Routledge 1990).

¹⁶⁵ I Kessler and J Purcell, 'Performance related pay: objectives and application' (1992) 2 (3) *Human Resource Management Journal* 16-33.

¹⁶⁶ R Markey, 'The internationalisation of representative employee participation and its impact in the Asia Pacific' (2006) 44 (3) *Asia Pacific Journal of Human Resources* 342-363.

efficiency has yielded the strongest base for employee involvement promotion since the 1980s, in a setting of increased competition in an international economic environment (e.g. works councils in Germany are endorsed with a substantial responsibility share for competitiveness and efficiency)'.¹⁶⁷

Common sense alone suggests that, if board decisions affect employees, then it is in the interests of justice that these employees are represented on the board to participate within consultation and decision-making. This is in alignment with the industrial democracy agenda.¹⁶⁸ There is no uniform model of board-level employee involvement among Member States and employee involvement varies among Member States with respect to (i) two-tier board structure (e.g. as in Germany) or monistic board structure; (ii) eligibility, nomination and election of employee representatives on the board; (iii) the proportion or size of employee representatives on to the board (e.g. one-third or equal representation); and (iv) the kind of companies which are obliged to adhere to employee involvement.

2.4.1 Corporate Social Responsibility (CSR)

EC frequently attempts to stress the importance of CSR. In its Green Paper 'European Corporate Governance Framework', EC makes reference to CSR in the first paragraph of the first page:¹⁶⁹

"Corporate governance and corporate social responsibility are key elements in building people's trust in the single market. They also contribute to the competitiveness of European business, because well run, sustainable companies are best placed to contribute to the ambitious growth targets set by 'Agenda 2020'¹⁷⁰."

¹⁶⁷ R Markey, 'The internationalisation of representative employee participation and its impact in the Asia Pacific' (2006) 44 (3) Asia Pacific Journal of Human Resources 342-363.

¹⁶⁸ H Knudsen, *Employee participation in Europe* (Sage 1995).

¹⁶⁹ Commission, 'The EU corporate governance framework' COM (2011) 164.

¹⁷⁰ 'Conclusions of the European Council of 17 June 2010' (*European Council*, 2010)

<http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/115346.pdf> accessed 31 October 2014.

Businesses have been urged to demonstrate their duty towards European society and not just to further the interests of shareholders' and employees.¹⁷¹ The EC recognises CSR as 'a concept where companies assimilate social and environmental interests in their business and voluntary interaction with their stakeholders'.¹⁷² Traditionally, CSR focuses more on environmental and human rights issues than on employment issues; trade unions take a dim view of CSR with respect to their interests. However, a 'stronger identification with CSR might be a significant approach of improving the legitimacy of employee involvement'.¹⁷³ One might assert that CSR is a voluntary role undertaken by corporations to contribute to society in their own way, and it would be inappropriate to list the issues that need to be covered under CSR (for example, employee involvement). Maybe for this reason, employee relations have never been a highlight of CSR. Some scholars suggest, however, that unions could try to use CSR to influence globalisation in the interests of employees and society as a whole.¹⁷⁴

2.4.2 *Employee involvement, governance and ownership*

Employee involvement is vital to the corporate governance of companies in the Member States, provoking intense discussion on power sharing between stakeholders and shareholders, the nature of the company and the relationship between company structure and productivity.¹⁷⁵ In Member States where employee involvement is prominent, especially board-level employee representation, such Member States have thrived during economic crises, political and social turmoil.¹⁷⁶ It is widely suggested that when employee representatives are elected on to the supervisory board of an SE or any other company within a Member State that have

¹⁷¹ Commission, 'Towards a Single Market Act – for a highly competitive social market economy' COM (2010) 608.

¹⁷² 'Industrial Relations in Europe' (*European Commission: Directorate General for Employment, Social Affairs and Equal Opportunities*, 2006) <<http://ec.europa.eu/social/BlobServlet?docId=1615&langId=en>> accessed 8 December 2014.

¹⁷³ S Vitols, 'Prospects for trade unions in the evolving European system of corporate governance' (ETUI-REHS Report 92 2005) <<http://library.fes.de/pdf-files/gurn/00299.pdf>> accessed 16 November 2014.

¹⁷⁴ Trade union (ETUI) writers like Aline Conchon.

¹⁷⁵ F Kubler, 'A Shifting Paradigm of European Company Law?' (2005) 11 *Columbia Journal of European Law* 219-240.

¹⁷⁶ G Jackson, 'Contested Boundaries: Ambiguity and Creativity in the Evolution of German Codetermination' in W Streeck and K Thelen (eds) *Beyond Continuity* (Oxford University Press 2005) 4, 24.

little experience of ‘codetermination’,¹⁷⁷ such involvement ‘advances a culture where codetermination is regarded by companies more as a norm than as an exception in Member State’.¹⁷⁸ This is in concurrence with the study findings of Ernst and Young, which were commissioned by Directorate-General Internal Market of the EC.¹⁷⁹ Wider connections exist between ‘employee involvement and the future progression of the company’s general ownership structure and governance’.¹⁸⁰ Njoya points out that those companies with already established traditions of codetermination adapt readily by embracing the closely-held shared ownership arrangement that prevails in the EU. On the other hand, “it may be the fact that these firms have a closely held structure with blocks of shares and dominant shareholders presenting holdup problems that makes codetermination necessary.”¹⁸¹ As a result, if ‘a codetermined firm procures a more disjointed shareholding, then codetermination would no longer be required and therefore the firm would be reasonably expected to withdraw codetermination after being made public’.¹⁸²

The correlation between codetermination and corporate governance (especially decision-making) has been found to be widely positive in most Member States because it presents a more balanced corporate approach. On many occasions, shareholders and employee representatives have mutually agreed on issues to further a company’s interests. For example, Gold’s study (which included interviews with employee representatives on the board in thirteen companies within Member States) finds that employee representatives play an essential role in decision-making

¹⁷⁷ ‘Codetermination’ is a term used to illustrate shared ownership, e.g. employee representatives on the supervisory board participating fully in making decisions for the company.

¹⁷⁸ W Njoya, ‘Employee ownership in the European company: reflexive law, reincorporation and escaping codetermination’ (2011) 11 (2) *Journal of Corporate Law Studies* 267-298.

¹⁷⁹ ‘Synthesis of the Comments on the Consultation Document of the Internal Market and Services Directorate-General on the Results of the Study on the Operation and the Impacts of the Statute for a European Company (SE)’ (*European Commission: Directorate General Internal Market and Services*, 2010) <http://ec.europa.eu/internal_market/consultations/docs/2010/se/summary_report_en.pdf> accessed 19 October 2014.

It is to be noted that overall the study findings established that employee involvement was a negative driver.

¹⁸⁰ W Njoya, ‘Employee ownership in the European company: reflexive law, reincorporation and escaping codetermination’ (2010) Centre for Business Research, University of Cambridge Working Paper No. 416 <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp416.pdf> accessed 6 December 2015.

¹⁸¹ Ibid.

¹⁸² Ibid.

along with shareholders' representatives.¹⁸³ For example, in one company, employee representatives in partnership with shareholder representatives defeated a merger proposal when employees identified the risks of the merger. In another, employee representatives opposed an outsourcing proposal based on the exchange rates argument (the argument was correctly put and the proposal was dismissed). These examples demonstrate that employees often possess extensive knowledge of the everyday workings of the company and are vital stakeholders. Employees' interests often run in conjunction with the companies' interests.

2.4.3 Property rights objections

Opponents of employee representation in corporate governance dismiss these arguments for employee involvement, asserting that there is not enough empirical evidence to support them. One of the most interesting objections to employee involvement in a company's governance is based on property rights.¹⁸⁴ This argument suggests that employee representation on the supervisory board is a clear infringement of the company or corporation owner's property rights.¹⁸⁵ This argument advocates that property owners (shareholders) have exclusive rights to delegate management powers to directors, who may initiate employee involvement arrangements if they see fit. The argument asserts that this decision should not be legally mandated or imposed for social reasons and later justified by asserting that employee involvement contributes to positive decision taking and good corporate governance. The objection based on property rights is built on the shareholder theory of corporate governance: that corporate governance's principal function is to maximise shareholder value.¹⁸⁶ The notion of separation of ownership and control¹⁸⁷ in the contemporary company had its foundation in property law, as analysed by

¹⁸³ M Gold, 'Taken on Board: An evaluation of the influence of employee board-level representatives in company decision-making across Europe' (2011) 17 (1) *European Journal of Industrial Relations* 41-56.

¹⁸⁴ JJ McCall, 'Employee Voice in Corporate Governance: A Defense of Strong Participation Rights' (2001) 11 (1) *Business Ethics Quarterly* 195-213. This notion was first conceptualised by A Berle and G Means which can be briefly studied in:

H Wells, 'The Birth of Corporate Governance' (2010) 33 (4) *Seattle University Law Review* 1247-1292.

¹⁸⁵ Property owners meaning shareholders.

¹⁸⁶ B Black and R Kraakman, 'A Self-Enforcing Model of Corporate Law' (1996) 109 *Harvard Law Review* 1911, 1921 and SM Bainbridge, 'In Defence of the Shareholder Wealth Maximization Norm: A Reply to Professor Green' (1993) 50 *Washington and Lee Law Review* 1423.

¹⁸⁷ EF Fama and MC Jensen, 'Separation of Ownership and Control' (1983) 26 *Journal of Law & Economics* 301.

Berle and Means.¹⁸⁸ The analysis advocates an owner's absolute control and residual rights because:

*"...if the individual is protected in the right both to use his own property as he sees fit and to receive the full fruits of its use, his desire for personal gain, for profits, can be relied upon as an effective incentive to his efficient use of any industrial property he may possess."*¹⁸⁹

The property right objection would seem to survive, even when shareholders have surrendered governance to board members. McCall argues that:

*"First, even if owners have ceded control, they possibly have done so under the assumption that management will act as their fiduciary and will promote the interests of shareholders alone. Second, that the property is the corporation's and that management has a quasi-ownership right to control the corporate assets. Under this interpretation, the right to control decisions is still vested in another constituency whose interests are in potential conflict with the interests of employees. A defence of strong employee participation rights must still, then, confront a property rights objection."*¹⁹⁰

In a contemporary quasi-public firm, this alignment of incentives breaks down. Shareholders (owners) do not exercise control over the firm, and managers (directors / employee representative directors) who manage the firm do not share in the residual profits. Managers may not be able to act in the best interests of shareholders, as the interests of shareholders and managers may diverge. As a result, there should not be any struggle between property owner rights and employees' representation in a board's decision-making process.

The property rights objection could be dismissed also by asserting that a company is not a piece of property but a union of several contracts expressing the contributions and responsibilities of numerous stakeholders in the company. Jensen and Meckling

¹⁸⁸ A Berle and G Means, *The Modern Corporation And Private Property* (Macmillan, London 1933) 8.

¹⁸⁹ Ibid.

¹⁹⁰ JJ McCall, 'Employee Voice in Corporate Governance: A Defense of Strong Participation Rights' (2001) 11 (1) *Business Ethics Quarterly* 195-213.

note that a company is a 'legal fiction'¹⁹¹, representing a nexus of several contracts and parties, and that a fictional notional cannot be owned.¹⁹² Even if any significance is attributed to the property rights objection, infringing corporate property owner rights and withdrawing employee involvement rights may both be ethically incorrect. It is a question of choosing the lesser of two evils to have a wider positive effect.

The criterion for good corporate governance is now increasingly a growing concern in Member States merely because what constitutes good corporate governance is still debateable. Some recognise the value of employee representatives¹⁹³ and some may regard employee representation as reintroducing 'investment inefficiency'.¹⁹⁴ Levinson's study, which surveyed company chairs and managing directors of prominent Swedish companies, found that 69% of company chairs were in favour of employee representatives having a positive impact on the governance of their respective companies, while only 5% held opposing views.¹⁹⁵ 61% of managing directors held positive views and only 9% considered employee representatives to be a negative driver in the governance structure.¹⁹⁶

A diverse boardroom with various stakeholder representatives may be less likely to make short-sighted and risky decisions. Employee involvement in corporate governance from an economic perspective serves as a 'monitoring mechanism on the board to reduce managerial agency costs which includes taking perks, shirking, excessive salary, minimising private blockholder privileges and maximising the company's value'.¹⁹⁷ Promoting employee involvement in corporate governance will

¹⁹¹ MC Jensen and WH Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305, 308.

¹⁹² WSW Leung, 'The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests' (1997) 30 *Columbia Journal of Law and Social Problems* 589, 591-92.

¹⁹³ This sometimes includes other board members.

¹⁹⁴ L Fauvera and ME Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards' (2006) 82 *Journal of Financial Economics* 673-710.

¹⁹⁵ K Levinson, 'Employee representatives on company boards in Sweden' (2001) 32 (3) *Industrial Relations Journal* 264-274.

¹⁹⁶ Ibid.

¹⁹⁷ L Fauvera and ME Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards' (2006) 82 *Journal of Financial Economics* 673-710.

probably help the EU to achieve its 2020 growth targets by developing and raising the bar of competition and sustainability.¹⁹⁸

2.5 Political basis: A continuing struggle

A Member State's domestic interference in employee involvement potentially comprises both social and economic reasoning and is assumed to have positive accomplishments which would benefit a variety of interested communities / stakeholders. The government rationale behind the establishment of involvement policies is consequently to develop nationalised economic efficiency whilst improving the work experience.¹⁹⁹

One of the first discussions on employee involvement by EU legislators was in 1975. The Green Paper on 'Employee Participation in Company Structure'²⁰⁰ emphasised that employee involvement from a legal standpoint develops social democracy and is a good corporate governance practice. From an economic standpoint, employee representation is regarded as a way of promoting information exchange, decreasing transaction costs and negotiating a course through changed scenarios.²⁰¹ However, no politically unanimous consensus yet has been reached as to whether employee involvement is beneficial, detrimental or neutral in a good corporate governance of SE, despite numerous research and legislative attempts. The following EU Directives and Regulations were some attempts made by the EU legislators with respect to the rights of employees within the EU:

- (i) Framework Directive for Health and Safety at Work²⁰²
- (ii) EWC Directive
- (iii) SE Regulation
- (iv) The Transfers of Undertakings Directive²⁰³

¹⁹⁸ Commission, 'Europe 2020: A strategy for smart, sustainable and inclusive growth' COM (2010) 2020 final.

¹⁹⁹ G Jackson, 'Employee Representation in the Board Compared: A Fuzzy Sets Analysis of Corporate Governance, Unionism and Political Institutions' (2005) 12 (3) *Industrielle Beziehungen* 7-11.

²⁰⁰ COM [75] 150.

²⁰¹ HA Simon, 'A Formal Theory of the Employment Relationship' (1951) 19 (3) *Econometrica* 293-305

²⁰² Council Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183.

²⁰³ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82.

- (v) SE Directive
- (vi) ICE Directive
- (vii) Employer Insolvency Directive²⁰⁴
- (viii) Directive for the protection of the interests of members and third parties²⁰⁵

Although there has been considerable progress at general level with respect to employee's information and consultation,²⁰⁶ but at board-level the progress has been sparse.²⁰⁷ The 'Vredeling Directive'²⁰⁸ whose anticipated prime objectives were to provide mandatory information, consultation, and representation of employees at board-level in multinational companies never came into effect due to lack of unanimity, differences of interests and political controversy among EU and domestic corporate actors.²⁰⁹ It included proposals about employee representation on the supervisory board and the right to vote for the managerial board, which was disapproved by various Member States for being too rigid²¹⁰ (e.g. UK in 1980's and 1990's²¹¹). After years of intense debate and political compromise, Member States finally adopted the SE Regulation and the SE Directive, which has touched on many aspects of employee involvement that were historically objected to by many Member States. Scholars like Enriques²¹² (previously mentioned) have rightly suggested that one would rationalise that EU legislators must have legislated ECS in order to fill the gaps of employee involvement, which were initially left unresolved in previous

²⁰⁴ Council Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L283.

²⁰⁵ Council Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent [2009] OJ L258/11: this is no longer in force.

²⁰⁶ Council Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L80.

²⁰⁷ G Hertig and JA McCahery, 'Optional rather than Mandatory EU Company Law: Framework and Specific Proposals' (2006) 4 European Company and Financial Law Review 348.

²⁰⁸ The Draft Fifth Company Law Directive.

²⁰⁹ B Keller and F Werner, 'New Forms of Employee Involvement at European Level- The Case of the European Company (SE)' (2011) British Journal of Industrial Relations 1-24.

²¹⁰ S Andreadakis, 'Regulatory Competition vs Harmonization: Is there a third way?' (2008) 6 (2) International and Comparative Corporate Law Journal 52.

²¹¹ M Gold, 'The European Works Council Directive- Changing Rationales of EU Employee Participation' in M Whittall and others (eds), *Towards a European Labour Identity: The Case of the European Works Council* (Routledge, Oxon 2007) 19-20.

²¹² L Enriques, 'EC Company Law Directives And Regulations: How Trivial Are They?' (2006) 27 (1) University of Pennsylvania Journal of International Law 2-78.

legislation and were in line with the growing demands of the EU's objective of the 'European social model'.

On the face of it, ECS appears to secure employees' involvement rights in company decisions and with a vision to establish a uniform legal framework, but there are now 28 different national SE laws. This is because the comprehensive legal framework has been left to the discretion of Member States where the SE is registered.²¹³ Furthermore, each Member State adopts a different view to employee involvement when implementing ECS. For example, Germany takes a more expansive approach and the UK takes a more restrictive one and this is owed to their own national traditions on the issue. Therefore, the governmental rationale on employee involvement is difficult to comprehend as discussion papers, working papers, public debates and adopted legislations claim to further the interests and rights of employees for universal benefit (social, economic and corporate governance), but in practice seem to have a very ambiguous effect on the issue. For example, ECS is in contradiction with its own fundamental principle and is contrary to the right provided under Article 153 of The Treaty on European Union. ECS fails to secure pre-existing representation rights at board level, but also has the possibility to circumvent representation rights at each Member State level.²¹⁴ Owing to the 'before and after principle'²¹⁵ in ECS, a company is only legally obliged to provide board-level representation rights if such rights were available to employees prior to the formation of an SE.²¹⁶ However, companies in Member States who have no company law provisions for employee representation at board-level (e.g. UK, Italy etc.) are not obligated to provide this right to employees in the new SE. Considering the objectives of ECS and Article 153 of The Treaty on European Union, it is also difficult to comprehend why ECS provides for 'freezing' of board-level representation rights (companies who have already representation rights in place, but are reluctant for any possible increases in those rights, e.g. from 1/3 representation to equal

²¹³ W Njoya, 'Employee ownership in the European company: reflexive law, reincorporation and escaping codetermination' (2010) Centre for Business Research, University of Cambridge Working Paper No. 416 <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp416.pdf> accessed 6 December 2015.

²¹⁴ B Keller and F Werner, 'New Forms of Employee Involvement at European Level- The Case of the European Company (SE)' (2011) British Journal of Industrial Relations 1-24.

²¹⁵ 18th Recital of the SE Directive.

²¹⁶ Article 4(4) of the SE Directive (when establishing SE through a conversion).

representation if the required threshold of employee increases), as seen in practice at GfK SE, Fresenius SE and Surteco SE.

CHAPTER 3- EVALUATION OF THE FUNCTIONING OF THE EUROPEAN COMPANY STATUTE

3.1 Background and historical development of the ECS

Contemporary company law instruments are the product of legislative developments that were initiated to satisfy the contracting interests of business parties and to minimise agency costs.²¹⁷ New legislation is introduced in an effort to 'augment social welfare by rectifying market failures' and 'governing company forms in the interest of the public'.²¹⁸ Various aspects of EU Company Law and legal research has focused on the corporate board's role in generating firm value and offsetting agency costs owing to the division of control and ownership.²¹⁹ Employee involvement that supposedly constrains management's privileges has been the most controversial issue of EU Company Law and has been debated by the EC since 1960s.

Employee involvement in the SE is now considered an integral part of the EU's corporate governance strategy. According to this strategy, a company's strategy must not be determined solely by the interests of its shareholders and directors, but also by those of other stakeholders. The academic view is that, with respect to employee involvement, EU Company Law can contribute to social welfare and simultaneously enhance a company's economic value. Ever since the 1960s, various facets of employee involvement have been on the EU's social and single market agenda. In that context, the EC identified four sets of political goals (previously discussed in *Section 1.3 The History of Employee Involvement and EU Directives*), which are now supposedly reflected in the EWC Directive, the ICE Directive and the ECS.

These three directives had different aims and effects. The EWC Directive enhanced employees' information and consultation rights throughout undertakings and groups

²¹⁷ 'Traditional and Innovative Approaches to Legal Reform: The New Company Law' (2006) The Research Institute of Economy, Trade and Industry Discussion Paper 07-E-033: <<http://www.rieti.go.jp/jp/publications/dp/07e033.pdf>> accessed 29 March 2015.

²¹⁸ Ibid.

²¹⁹ L Fauvera and ME Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards' (2006) 82 Journal of Financial Economics 673-710.

of undertakings across the EU.²²⁰ The ICE Directive extended information and consultation rights to national companies.²²¹ It aimed to reinforce European-level support for informing and consulting with employees in an international business environment by escalating social dialogue among the employees market parties, as legislators felt that there were insufficient legislative measures at both EU and domestic level.²²² However, the most significant achievement of EU legislators in moving towards securing employees' representation and information at a general level was the adoption of the ECS.

The SE Regulation is not comprehensive. It fails to discuss many aspects of EU Company Law (for example, tax), and some scholars suggest that it has 'deliberately' failed to cover these aspects, leaving them at the Member State's discretion.²²³ The SE Regulation has referred to domestic legislation of Member States 84 times in its text.²²⁴ The SE Directive, on the other hand, signifies evolution to the present cross-border consultation and information rights under the EWC Directive. For the first time, 'participation' rights are included in this legislation as a central part of negotiations. As discussed previously in *Chapter 1- Employee Involvement in the EU's Corporate Governance Regime*, 'participation' in this context means exerting influence over the formation of the administrative body or the supervisory board.²²⁵

The EC published the first draft proposal and memorandum for the SEs in 1966. By 1970, a formal preliminary draft on the SE Regulation encompassing all the main aspects of its activities was introduced.²²⁶ Three types of employee involvement were incorporated in this draft: (i) European works council; (ii) board-level employee representation; and (iii) collective agreements. This was influenced by the company

²²⁰ Enriques et al., 'The Basic Governance Structure: Minority Shareholders and Non-Shareholders Constituencies' in Kraakman R and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 89-114.

²²¹ Ibid.

²²² H Lamponen, 'The Principle On Employee Protection In A Merger And A Transfer Of An Undertaking' (Ph.D. thesis, University of Helsinki 2009).

²²³ M Siems, 'The impact of the European Company (SE) on legal culture' (2005) 30 *European Law Review* 431-442.

²²⁴ Ibid.

²²⁵ This can include the right to recommend or reject board members and appoint employee representatives on the board as well.

²²⁶ Commission, 'Proposal for a Regulation on the Statute of the Societas Europaea' COM (1970) 600 final.

law traditions in Germany which specified a mandatory two-tier model.²²⁷ However, no agreement on this proposed regulation was reached because of the variation in Member States' Company Law and the problematic issue of defining employee involvement. Domestic company law vehicles in various Member States were reluctant to permit board-level employee representation (one-tier board representation or two-tier representation); some Member States allowed this minimally.²²⁸ In 1975, the EC's proposal was revised by the proposal of one-third parity: one third of board members would be appointed by employees, one third by shareholders and the other third would be appointed jointly.²²⁹ This proposal was resolutely opposed by the Netherlands, who claimed that the idea was 'inspired' by 'Mitbestimmung' (German for codetermination); they preferred a more relaxed system, as in the UK.²³⁰ In 1989, the EC made another attempt: in this third proposal. The SE legislation was proposed to be divided into the SE Regulation and the SE Directive, supplementing it with respect to employee involvement.²³¹ The SE would be able to choose between one-tier board representation and two-tier representation and the SE Directive allowed Member States to choose between the German, Scandinavian, French or Dutch models.

After years of unsuccessful struggle for an agreement, the EC commissioned the Davignon Group²³², who in their final report (Davignon Report, 1997) submitted that the Member States policies on employee involvement were too diverse to make harmonisation possible. The group proposed that an arrangement of participation

²²⁷ Rehfeldt et al., 'Employee involvement in companies under the European Company Statute' (*European Foundation for the Improvement of Living and Working Conditions Luxembourg: Publications Office of the European Union*, 2011)
<<http://www.eurofound.europa.eu/publications/report/2011/industrial-relations/employee-involvement-in-companies-under-the-european-company-statute>> accessed 18 May 2015.

²²⁸ M Gold and S Schwimbersky, 'The European Company Statute: Implications for Industrial Relations in the European Union' (2008) 14 (3) *European Journal of Industrial Relations* 46-64.

²²⁹ Commission, 'Proposal for a Council Regulation on the Statute for European Companies. Amended proposal presented by the Commission to the Council on 13 May 1975, pursuant to the second paragraph of Article 149 of the EEC Treaty' (Communication) COM (75) 150 final.

²³⁰ Rehfeldt et al., 'Employee involvement in companies under the European Company Statute' (*European Foundation for the Improvement of Living and Working Conditions Luxembourg: Publications Office of the European Union*, 2011)
<<http://www.eurofound.europa.eu/publications/report/2011/industrial-relations/employee-involvement-in-companies-under-the-european-company-statute>> accessed 18 May 2015.

²³¹ Commission, 'Proposal for a Council Directive Complementing the Statute for a European Company with regard to the Involvement of Employees in the European Company' COM (1989) 268 final.

²³² High-level group of experts on employee involvement. Etienne Davignon was the chairman of this group (a former vice president of EC and an industrialist).

should be determined by negotiations between employee representatives and management. The standard rules would be applicable if the negotiations failed.²³³ While the outcome of the Davignon Report was positive, unanimity was yet to be achieved. It was not until 2004 that the ECS came into force, and it was not until two years after the deadline had passed when it was transposed in all Member States.²³⁴

3.2 Summarising European Company

The SE's legal form is supranational. It allows companies from different Member States to function under common rules and management having its individual legislative framework. This provides companies that want to expand beyond their national borders the option to be subject to a single set of laws, rather than the laws of each Member State where the company is active. There is no definite Treaty foundation for the adoption of ECS by the EU, but the legal basis is Article 352 of The Treaty on European Union, which allows the European Council functioning unanimously to embrace legislation when required to achieve the Treaty's objectives. Subsequently, the SE is not 'constitutionally obligated to the multifaceted approach to EU corporate or company law of Article 50(2)(g) of The Treaty on European Union'.²³⁵ An SE's registered office within a Member State can be transferred, which can subsequently make it a more attractive market for companies.²³⁶

The SE Regulation encompasses the company law for creating an SE and combines various methods for creating management structures and employee involvement. The SE Directive, on the other hand, specifies the context for employee participation. An SE may be established by (i) the merger of two or more existing public limited-liability companies from two different Member States at least,²³⁷ (ii) the formation of a holding company by public or private limited liability companies from two different

²³³ 'Corporate Governance, Policy Area: Doing Business in Europe' (*European Union Center of North Carolina EU Briefings*, 2008) <<http://europe.unc.edu/wp-content/uploads/2013/08/Brief0803-corporate-governance.pdf>> accessed 1 April 2015.

²³⁴ Ibid.

²³⁵ J Borg-Barthet, 'The Governing Law of Companies in EU Law' (Ph.D. thesis, University of Aberdeen 2010).

²³⁶ 'Corporate Governance, Policy Area: Doing Business in Europe' (*European Union Center of North Carolina EU Briefings*, 2008) <<http://europe.unc.edu/wp-content/uploads/2013/08/Brief0803-corporate-governance.pdf>> accessed 1 April 2015.

²³⁷ Section 2 of the SE Regulation.

Member States at least;²³⁸ (iii) creating a subsidiary by an SE;²³⁹ or (iv) transformation of a public limited liability company that has had a subsidiary in a different Member State for a minimum of two years.²⁴⁰ The subscribed minimum capital is €120,000 for establishing an SE, and the name of the company should be followed or headed by “SE” (e.g. Porsche Automobil Holding SE).

The SE Directive attempts to develop the current corporate governance structures prevalent in the EU in accordance with the EU social model.²⁴¹ Therefore, employee information, consultation and participation are critical to the SE Directive and, for this reason; the type of employee involvement to be used needs to be negotiated as a mandatory requirement before an SE can be validly registered.²⁴² The SE Directive sets out numerous provisions on employee involvement in the SE. Employee representatives are allowed to approve the formation of the board of management (one-tier) or the supervisory board (two-tier).²⁴³ The SE Directive allows the one-tier system's administrative organ or the two-tier system's management organ to start negotiations with employee representatives about arrangements for employees' involvement;²⁴⁴ to do so, a Special Negotiating Body (hereafter, referred to as the “SNB”) representative of the employees is created.²⁴⁵ The SNB would negotiate measures with the management to establish a stable employee representative body and to consult on its participation rights. The SE does not provide a uniform model for this; the parties can have their own agreement regarding the nature of employee involvement.²⁴⁶

Furthermore, to minimise the application of prevailing domestic board-level employee representation rights, two-thirds of the SNB representatives must back the

²³⁸ Section 3 of the SE Regulation.

²³⁹ Section 4 of the SE Regulation.

²⁴⁰ Section 5 of the SE Regulation.

²⁴¹ Rehfeldt et al., ‘Employee involvement in companies under the European Company Statute’ (*European Foundation for the Improvement of Living and Working Conditions Luxembourg: Publications Office of the European Union*, 2011) <<http://www.eurofound.europa.eu/publications/report/2011/industrial-relations/employee-involvement-in-companies-under-the-european-company-statute>> accessed 18 May 2015.

²⁴² Pursuant to Article 4 of the SE Directive.

²⁴³ JA McCahery and EPM Vermeulen, ‘Does the European Company Prevent the ‘Delaware Effect’?’ (2005) 11 (6) *European Law Journal* 798.

²⁴⁴ Article 3(1) of the SE Directive.

²⁴⁵ Article 3(2) of the SE Directive.

²⁴⁶ Wisskirchen et al., ‘Employee Representation and Co-determination Rights in Europe’ (2010) 1 *Labour and Employee Benefits Handbook*.

arrangement in a company where pre-existing rights included at least 25% employees in an SE formed by merger (or 50% in the creation of joint subsidiaries or a holding company).²⁴⁷ An SNB cannot minimise pre-existing rights if an SE is formed by conversion. The standard Annex rules to the SE Directive will be applicable if the management and SNB agree or cannot reach an agreement within a set time. Any pre-existing rights of board-level employee representation will still be applicable where the SE is formed by conversion. Employee information and consultation rights will always be included in the agreement, but with respect to board-level employee representation rights, the 'before and after principle' will apply, which would safeguard any pre-existing rights. However, if none of the companies had board-level employee representation rights prior to the establishment of SE, then no representation rights will be applicable after the SE is registered.²⁴⁸

3.3 The efficiency of the SE Directive

The SE Directive may have been a historic achievement, delivered after decades of negotiation in the EU,²⁴⁹ but it has shortcomings that defeat the fundamental principle of the statute and are contrary to the rights provided under Article 153 of The Treaty on European Union. The legal framework for the SE Directive fails to secure pre-existing representation rights at board-level for employees in companies intending to become an SE, but also allows a company to circumvent representation rights at national level.²⁵⁰ First, owing to the 'before and after' principle,²⁵¹ a company is only legally obliged to provide board-level representation rights if they were available to employees prior to the formation of an SE.²⁵² Because it protects only existing provisions for employee participation, the SE Directive in fact weakens codetermination rights. Secondly, in a Member State with no company law provisions for employee representation at board level (e.g. UK, Italy etc.), a company is not

²⁴⁷ Article 3(4) of the SE Directive.

²⁴⁸ Ibid.

²⁴⁹ Rehfeldt et al., 'Employee involvement in companies under the European Company Statute' (*European Foundation for the Improvement of Living and Working Conditions Luxembourg: Publications Office of the European Union*, 2011)

<<http://www.eurofound.europa.eu/publications/report/2011/industrial-relations/employee-involvement-in-companies-under-the-european-company-statute>> accessed 18 May 2015.

²⁵⁰ B Keller and F Werner, 'New Forms of Employee Involvement at European Level- The Case of the European Company (SE)' (2011) *British Journal of Industrial Relations* 629.

²⁵¹ 18th Recital of the SE Directive.

²⁵² Article 4(4) of the SE Directive (when establishing SE through a conversion).

obliged to provide this right to employees in the new SE unless it has a separate agreement to state otherwise.²⁵³

Companies could avoid granting board-level representation rights by keeping the number of employees below the minimum threshold stated in the SE Directive. That minimum is applicable within each Member State, so that companies domestically could opt to convert into an SE before reaching their individual Member State's threshold. Eidenmüller et al. argue that 'domestic provisions on mandatory employee involvement in the supervisory board considerably increases the number of SEs registered in a Member State, thereby implying that the SE model provides an option to circumvent domestic level employee involvement.'²⁵⁴ Some argue that this notion is based on the example of Germany, where a fraction of companies have converted into an SE to circumvent employee involvement rights.²⁵⁵ However, this has not been confirmed empirically. Köstler points out that only a small number of current German SEs were PLCs and characterised by board-level employee representation before being registered as an SE.²⁵⁶ This reiterates the point made before that it is incomprehensible to conceptualise the notion of 'freezing' of board-level representation rights, especially when considering Article 153 of The Treaty on European Union and the objectives of the SE Directive. This is particularly relevant for German companies, which will require to increase their employees' board-level representation rights to equal representation if the threshold of their employees reaches 2000.²⁵⁷ It was claimed by the GfK SE employee representatives that the decision to convert GfK into a SE was to avoid the conversion from 1/3 employee representation to equal representation, as that time they were very close to the 2,000

²⁵³ Rehfeldt et al., 'Employee involvement in companies under the European Company Statute' (*European Foundation for the Improvement of Living and Working Conditions Luxembourg: Publications Office of the European Union*, 2011) <<http://www.eurofound.europa.eu/publications/report/2011/industrial-relations/employee-involvement-in-companies-under-the-european-company-statute>> accessed 18 May 2015.

²⁵⁴ Eidenmüller et al., 'Incorporating under European Law: The Societas Europaea as a vehicle for legal arbitrage' (2009) 10 *European Business Organisation Law* 1-33.

²⁵⁵ Rehfeldt et al., 'Employee involvement in companies under the European Company Statute' (*European Foundation for the Improvement of Living and Working Conditions Luxembourg: Publications Office of the European Union*, 2011) <<http://www.eurofound.europa.eu/publications/report/2011/industrial-relations/employee-involvement-in-companies-under-the-european-company-statute>> accessed 18 May 2015.

²⁵⁶ R Köstler and F Werner, 'SE zwischen Eiszeit und Europa' (2007) 60 *Mitbestimmung* 48-51.

²⁵⁷ A von Werder, 'Modern Modernisierung der Mitbestimmung' (2004) 2 *Die Betriebswirtschaft* 229-258.

employees threshold.²⁵⁸ This was also confirmed by the GfK management that this was a 'positive side-effect' of transforming into an SE.²⁵⁹ The EC has identified that the SE Directive has not addressed and does not provide legal certainty regarding some aspects of employee involvement negotiation procedure. These situations include: (i) when no employee representatives opt to participate in the SNB or are ineligible; (ii) the lack of rules governing the SE Representative Body relationship with the European Works Council (EWC) that may be there within the group of companies; (iii) the connection between the domestic and cross-border levels of information and consultation are not administered; and (iv) there is no process of calculating the number of employees to be involved in the negotiation procedure (this can lead to the unbalance in the influence of different parties involved in the negotiation).²⁶⁰ These issues may not be substantial and might be easily resolved with mutual understanding or by defining rules; but they create uncertainty and potentially waste resources and time. For example, the employer's association and trade unions in Spain recognise that the lack of legal certainty in these matters has affected the formation of the SEs in Spain – for example, in calculating the number of employees to be involved in the negotiation procedure – but they do not see it as a significant issue. Legal uncertainty also affects the relationship between employee representatives in the EWC and a group of SEs.

Article 2-3 of the SE Regulation provides for an SE to set up additional SEs as subsidiaries, and this provision has effectively threatened employee involvement rights in SEs. The ECS mechanisms for providing employee involvement rights are only assured when the SEs are founded. When employees are subsequently recruited, it becomes difficult to negotiate employee involvement rights. As a result, involvement rights could be legitimately denied to employees in an SE in which these rights have been previously activated. The SE Directive does not provide for any mechanism that would facilitate restarting employee involvement negotiations after an SE has been established, and any changes that may happen later. Furthermore, it provides that:

²⁵⁸ L Fulton, Employee involvement in companies under the European Company Statute (ECS)- Case study: GfK SE (Eurofound 2011) <<http://edz.bib.uni-mannheim.de/daten/edz-ma/esl/10/EF10783EN.pdf>> accessed 11 May 2015.

²⁵⁹ Ibid.

²⁶⁰ Questions related to the review of the SE Directive- Basic considerations for the Social Partners' consultation.

*“It is a fundamental principle and stated aim of this Directive to secure employees’ acquired rights as regards involvement in company decisions. Employee rights in force before the establishment of SEs should provide the basis for employee rights of involvement in the SE (the “before and after” principle). Consequently, that approach should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes.”*²⁶¹

This is a major shortcoming. EU legislators have failed to define ‘structural change’ and have failed to prescribe the procedure for restarting employee involvement negotiations after an SE has been established. There have been attempts to explain ‘structural changes’. For instance, German courts have concurred that employee growth in a company would be regarded as a ‘structural change; some legal scholars suggest that this interpretation is too restrictive.²⁶² France, Germany, Austria, the Netherlands and Malta tried in their domestic provisions when transposing the SE Directive to provide for restarting negotiations when a major change in SE occurs (for example, a substantial increase in the number of employees).

As previously discussed in *Section 1.4 Employee involvement and the European Company Statute*, the founding ground of setting up an SE and considering employee involvement rights seems to make a mockery of the concept as it is the shareholders who decide in their General Meeting whether to choose a monistic or dualistic board system.²⁶³ Employees do not exert any influence at all in the option of the board structure. This gives rise to a question whether shareholders’ decisions (residual owners in the company) should take precedence over that of the employees.²⁶⁴

²⁶¹ Preamble paragraph 18, in correlation with Article 11 of the SE Directive.

²⁶² ‘Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482’ (Ernst & Young, 2008)
<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf>
accessed 11 March 2015.

²⁶³ Article 38 of the SE Regulation.

²⁶⁴ See, *Section 2.4.3 Property rights objections*.

Therefore, due to this procedure, a company who never intended to have substantial employee involvement rights can opt to circumvent by opting for a monistic board. Furthermore, employee representatives at board-level (monistic or dualistic) have no recourse to prevent or block a disputed board decision in question if all shareholder representatives act unanimously;²⁶⁵ and in the event of a tie where there is equal representation of employee and shareholders representatives, the chairman has a casting vote.²⁶⁶

Other contentious issues that prevent the SE Directive from achieving its objectives are summarised in the table below:

<i>Issue in contention</i>	<i>Negative consequence</i>
Group level employee representation	The EU legislator has failed to acknowledge the issue of employee involvement rights at group level within the SE Directive (e.g. prevalent in certain Member States like France- ' <i>comité de groupe</i> ').
Denominating employee representatives in the supervisory board	Article 4(4) and Part 3(a) Annex of the SE Directive has not been interpreted broadly and clarity on the number of employee representatives on the board is essentially required.
SE's basic rules	Furthermore, the SE Directive only provides a basic framework for overall incorporation, and the detailed rules of law have been left to the Member State's discretion where the SE is registered. This gives Member States autonomy to have their individual employee involvement cultures embedded when transposing the SE Directive. Therefore, there will be 28 different SE legislation as opposed to the objective to having a "European Company".
Uncertainty with SNB's undermining board-level employee involvement rights	SNB's may be tempted to give up extensive or partial board-level employee representation rights in exchange for added resources and extended rights for the SE works council (e.g. as seen in Hager SE). ²⁶⁷
Reduction in employee involvement rights, when an SE converts back to a public limited company	A company within a Member State could first incorporate as an SE and later convert back to a public limited company. ²⁶⁸ This is a possible strategy to circumvent employee involvement rights as the employee involvement rights will be lost or minimised if the new form of company created does not embrace employee involvement rights or the degree of employee involvement is lessened. ²⁶⁹

Table 6- Other negative consequence of the SE Directive

²⁶⁵ M Stollt and E Wolters, *Worker involvement in the European Company (SE) - A handbook for practitioners* (ETUI 2011).

²⁶⁶ Article 50(2) of the SE Regulation.

²⁶⁷ Rehfeldt et al., 'Employee involvement in companies under the European Company Statute' (*European Foundation for the Improvement of Living and Working Conditions Luxembourg: Publications Office of the European Union*, 2011)

<<http://www.eurofound.europa.eu/publications/report/2011/industrial-relations/employee-involvement-in-companies-under-the-european-company-statute>> accessed 18 May 2015.

²⁶⁸ Pursuant to Article 66 of the SE Regulation.

²⁶⁹ Commission, 'Communication from the Commission on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees' COM (2008) 591 final.

The SE Directive contains other provisions that, although not related to employee involvement, still make SE an unattractive company model for stakeholders other than shareholders. In particular, an SE can only be ‘incorporated by companies already registered under their individual Member State’s domestic legislation and not available to natural persons’. Economically speaking, this provides further obstacles ‘financially and administratively’.²⁷⁰ Further, the SE Directive surrenders creditors’ and minority shareholders’ interests, which are left to the discretion of the Member State’s legislation. Usually, minority shareholders have the option to buy back their shares at a ‘proportionate’ rate if they opposed the SE’s creation or the proposal to transfer the registered office (at the general meeting).²⁷¹ Creditors’ interests are also left to the discretion of the legislation of the Member State concerned, due to the merger’s cross-border nature.²⁷² Both the SE Directive and the SE Regulation are ambiguous in this regard: Member States may protect the interests of creditors and minority shareholders in different ways. It should be noted that no example of this happening has yet been recorded.

Bearing these shortcomings in mind, the EC reviewed the SE Directive²⁷³ and subsequently shortlisted the issues of “regime shopping”²⁷⁴ and group-level employee participation²⁷⁵ as ‘major concerns’.²⁷⁶ However, the EC took the view that it was too early to conduct a full assessment or judge the directive, because it had been transposed only recently.²⁷⁷ The EC cites that lack of practice in applying the

²⁷⁰ J Borg-Barthet, 'The Governing Law of Companies in EU Law' (Ph.D. thesis, University of Aberdeen 2010).

²⁷¹ If the rate is not deemed to be proportionate, then each shareholder may request the court to grant extra payment.

²⁷² K Máziková and M Hrapko, 'Accounting Harmonization and Market Conditions Under Impact of a European Company' (2008) 3 (2) Management Information Systems 3-9.

²⁷³ Pursuant to Article 15 of the SE Directive.

²⁷⁴ The SE Directive provides facilitation for companies within the EU to establish their registered offices in Member States where employee participation rights are weaker compared to other Member States.

²⁷⁵ As the existing degree of extensive cross-border diversity at which employees’ involvement is exercised at group level in some Member States compared to others.

²⁷⁶ Commission, 'Communication from the Commission on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees' COM (2008) 591 final.

²⁷⁷ Only 146 SEs were registered at the time of review in June 2008. See, 'European Company (SE) Database' <<http://ecdb.worker-participation.eu>> accessed 11 April 2015.

SE Directive in Member States as a reason for not yet revising it.²⁷⁸ Given that any identified shortcoming with the SE Directive will remain a shortcoming regardless of time and experience, this reasoning seems frivolous. These issues, if not resolutely addressed, will continue to make the SE a less preferred form of company. It is likely that the EC has decided against revising the SE Directive because it fears going back to the political turmoil that led to five decades of negotiation. The issue of employee involvement is still sensitive and yet necessary.

Another obstacle that makes the SE less attractive is the mandatory requirement to negotiate employee participation and the creation of a SNB. The process is lengthy, time-consuming and overly complicated, principally because a company proposing to convert to an SE needs to take expert advice, thus adding costs to the €120,000 minimum capital requirement. These requirements make the SE less attractive especially to start-up businesses or small and medium sized enterprises. These businesses must, therefore, continue to rely on the existing corporate systems under their own domestic legislation until they have the required funds to convert their businesses into an SE.²⁷⁹ Borg-Barthet critically comments that if these businesses:

*“wish to benefit from corporate mobility and transfer their seat to another jurisdiction, it appears that it may be easier to do so by taking advantage of the developments in the case-law concerning freedom of establishment, provided that they also change their governing law.”*²⁸⁰

Only 2,757 SEs have been established in the last decade since the ECS came into force.²⁸¹ This number demonstrates the apparent lack of interest among Member States in the SE. However, the numbers of established SEs in the Czech Republic and Germany have considerably increased. The SE was anticipated to resolve the problem of companies within its Member State by facilitating movement without the

²⁷⁸ Commission, 'Communication from the Commission on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees' COM (2008) 591.

²⁷⁹ J Borg-Barthet, 'The Governing Law of Companies in EU Law' (Ph.D. thesis, University of Aberdeen 2010).

²⁸⁰ Ibid.

²⁸¹ Figures correct as of 31 March 2017. See, 'SE Companies: Facts and Figures 2017' (*SEEurope*, March 2017) <<http://www.worker-participation.eu/European-Company-SE/Facts-Figures>> accessed 18 April 2017.

need for incorporation or dissolution. The impact of the SE Directive is limited when the objectives of the ECS and the accuracy and efficiency of the SEs are compared, as summarised in the table below:

<i>Objectives</i>	To complete the notion of the internal market so competitiveness and efficiency can be augmented, since the SE conforms to EU's economic framework. ²⁸²
	To facilitate companies with cross-border aspects to restructure, amalgamate and increase their operations on an EU level scale which would facilitate transferring company's registered office to another Member State readily and at the same time securing interests of shareholders and stakeholders (including employees). ²⁸³
	To facilitate companies with cross-border aspects to opt for an appropriate corporate governance structure that would provide management efficiency, apt supervision and securing employee involvement rights. ²⁸⁴
<i>Veracity and efficiency of the SE</i>	<p>There is a substantial distinction due to the following aspects when the SE's reality and advancement is concerned:</p> <div> <div> <u>Activity areas</u> Most SEs are functioning within the service sectors (especially banking and financial sector), while the manufacturing sector comprises only 7% of the total count. SE is frequently used by insurance and finance businesses group for regulatory issues i.e. computation of the solvency and capital ratios; the manner in which businesses operate within an SE having branches across Member States can be a befitting mechanism in this sector to restructure the group. It is interesting to note that most SEs are in fact shelf SEs.²⁸⁵ </div> <div> <u>Group reorganisation</u> SE is a corporate entity opted by groups,²⁸⁶ and it holds the parent company position within the group.²⁸⁷ 20% of the total of non-shelf SEs exists as subsidiaries. SE creation is equally brought about by creation of a subsidiary, creation of a joint subsidiary, merger and conversion. Instead of amalgamating previously sovereign companies, SE functions as an ingredient of a group strategy: for example, integration of corporate governance or simplification of group structure. Establishing SEs facilitates group restructuring and decreases the number of legal entities, especially when an SE is created by cross-border merger. Nonetheless, decreasing the number of legal entities results in reduced margins of limited liability, which European groups find less appealing. Groups restructuring and reorganisation can also be made possible via cross-border mergers since the EU's adoption of the Cross-Border Mergers Directive.²⁸⁸ However, this aspect of group restructuring, and reorganisation of cross-border groups, is limited owing to disharmony in the insolvency, tax, intellectual property and competition fields. </div> <div> <u>Relocating registered office</u> Owing to a harmonised procedure, the SE Directive allows EU companies to transfer registered and head offices to another Member State, as this option was not available to domestic companies. The option to freely transfer its registered office across Member States is attractive for companies who wish to opt for a lenient or favourable legislation, and is arguably one of the reasons for forming an SE (as discussed previously) from the perspective of employee </div> </div>

²⁸² Preamble paragraphs 1, 4 and 8, SE Regulation.

²⁸³ Preamble paragraphs 1, 6 and 24, SE Regulation.

²⁸⁴ Preamble paragraphs 14 and 21, SE Regulation.

²⁸⁵ These are more prevalent in Czech Republic, Slovakia and Sweden.

²⁸⁶ 5% of non-shelf SEs are sovereign companies.

²⁸⁷ 75% of non-shelf SEs on average.

²⁸⁸ Council Directive 2005/56 of the European Parliament and of the Council on cross-border mergers of limited liability companies [2005] OJ L310.

	<p>involvement, corporate governance rules etc. UK, Luxembourg, France and Cyprus are the main chosen Member States to have the registered offices transferred. Furthermore, from a labour, tax and corporate governance perspective, the transfer of registered and head offices of the SEs in reality has advantaged Member States with an added flexible legislation.</p>
	<p><u>Safeguarding various stakeholders' interests</u> With respect to the adoption of the ECS, the major concern of any Member State was various stakeholders' interests. Safeguarding these interests is normally in consideration of the policies pertinent to the SE with those of the national PLCs. However, sometimes bigger protection is provided to SE stakeholders owing to its global nature, as many Member States prohibit the cross-border transfer of national PLC's registered offices. Subsequently, Member States like Cyprus, Portugal and Germany provide greater level of stakeholder protection than UK, Luxembourg and Belgium, where greater interest is paid to shareholders.</p>
	<p><u>Harmonisation of corporate governance structure</u> SE is less frequently chosen by companies within Member States as a tool for corporate governance structure's harmonisation. Since the SE provides that registered and head office must be in the same Member State, a cross-border group cannot exercise singular SE but must exercise the SEs in each Member State respectively, thereby leading to slight differences. i) Opting for efficient management system of corporate governance: SE provides added options for companies from Member States where only one corporate governance structure is available to PLCs. Respectively, the SE Directive has administered a starting point for corporate governance systems harmonisation across EU and efficient management notion. SE is far more accomplished in Member States like Lithuania, Estonia, Latvia, Poland, Slovakia, Germany, the Netherlands, Cyprus and Czech Republic where one-tier corporate governance structure is not available to national PLCs, compared to Spain, UK, Ireland, Belgium, Denmark and Sweden, where it is available. ii) Opting for proficient supervision system of corporate governance: Proficient supervision is provided for in both one-tier and two tier corporate governance structures in the SE Directive. However, the one-tier corporate governance structure is ambiguous owing to the lack of a clear definition from the EU. This leads to complexities in linking employee involvement with proficient supervision, especially when concerning administrative organ.</p>
	<p><u>Employee involvement</u> The employee involvement negotiation procedure while creating an SE provides for bespoke solutions for companies concerned and the SE Directive's standard rules on negotiation grants employees' substantial protection of their pre-existing involvement rights before an SE is formed.²⁸⁹ This is even after the SE negotiation procedure is regarded as abundantly time consuming and ambiguous. Leaving aside situations where the employee involvement negotiation procedure appears complex or not tailored to situations like where shelf SEs are activated afterwards, substantial protection of employee rights is usually ensured. Certain SEs like shelf SEs are formed irrespective of the employee involvement negotiation procedure. On the face of it, this will not be in full compliance of the objectives of the ECS.</p>
	<p>Therefore, the SE Directive provides for EU cross-border groups to adjust their organisational formation and to choose a more appropriate corporate governance system that in return provides efficient management, proficient supervision and securing employee involvement rights.</p>

Table 7- Analysing ECS efficiency²⁹⁰

²⁸⁹ Before and after principle.

²⁹⁰ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (Ernst & Young, 2008)

3.4 The SE as a positive driver to the EU market

The SE is designed to play a substantial role in contributing positively to the EU single market and the European Social Model, by securing and augmenting employee involvement rights. The following factors can be identified to support this claim.

3.4.1 Cross-border reorganisation

The ECS offers a secure legal foundation for national companies within a Member State to 'initiate cross-border restructurings of companies, e.g. establishment of joint ventures, establishment of European holdings and mergers'.²⁹¹ The SE provides that there is no requirement for companies to establish a network of subsidiaries, which would have been governed by individual set of legislation in the Member State where it was created, thereby avoiding the practical and legal limitations which will arise from 28 different legislations. Companies can restructure and increase their operations on a cross-border level. Subsequently, SE will operate on a uniform governance structure, reporting system and management; this decreases administrative and legal costs substantially.²⁹² Furthermore, relocation expenses are reduced further since relocating a registered and head office will not require an SE to conclude the company in one Member State and register again in another Member State.²⁹³

3.4.2 One-tier and two-tier governance system

One of the notable contributions of the SE Directive is that it allows the establishing companies to choose between one-tier and two-tier corporate governance

<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 11 March 2015.

²⁹¹ 'Societas Europaea' (CMS Legal Services, 2011)

<http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/74b1540e-27c1-43fa-ac4d-3439dbb90f84/Presentation/PublicationAttachment/e24c0ec3-6cc0-4438-a5e6-346dd833e798/CMS_Societas_Europaea_May2011.pdf> accessed 1 May 2015.

²⁹² 'The European Company Statute' (Enterprise Europe Network London, 2006)

<<http://www.londonchamber.co.uk/docimages/7034.pdf>> accessed 18 March 2015.

²⁹³ 'Corporate Governance, Policy Area: Doing Business in Europe' (European Union Center of North Carolina EU Briefings, 2008) <<http://europe.unc.edu/wp-content/uploads/2013/08/Brief0803-corporate-governance.pdf>> accessed 1 April 2015.

systems.²⁹⁴ This allows a company to opt for a system that best suits its nature and requirements and to introduce a similar corporate governance structure in all Member States. Under the two-tier corporate governance system, an SE can be created with a supervisory board and a management board; the one-tier corporate governance system combines supervisory board functions and management board functions into one administrative organ.²⁹⁵

3.4.3 The option to freely transfer the SE's registered office to a different Member State

An SE's registered office can be freely relocated to any Member State of more favourable location with respect to the SE's activities without compromising its corporate identity or being bound by creditors' prior consent.²⁹⁶ Subsequently, the SE's head office must be relocated to that Member State simultaneously, since both the registered office and head office should be in the same Member State.²⁹⁷ This is especially positive for the EU market: since the SE is regulated by the legislation of the Member State where it is registered, the Member State is under constant pressure to regularly advance their business environment so that the SE is deterred from moving to another Member State with more favourable legislation.

3.4.4 Extension of employee involvement rights

It is generally assumed that the SE Directive presents a uniform model for employee involvement, but in fact the SE Directive and the SE Regulation both focus on and encourage the negotiation procedure. An SNB comprising employee and management representatives have the task of successfully negotiating the policies of employee involvement for the SE in question. Representatives of both sides are autonomous in approving the terms of the agreement;²⁹⁸ if the negotiations are

²⁹⁴ K Máziková and M Hrapko, 'Accounting Harmonization and Market Conditions Under Impact of a European Company' (2008) 3 (2) Management Information Systems 3-9.

²⁹⁵ Similar to Anglo-American board system.

²⁹⁶ Pursuant to Article 8 of the SE Regulation (which provides that the transfer will not lead to the SE's liquidation or a new company formation).

²⁹⁷ 'Societas Europaea' (CMS Legal Services, 2011)

<http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/74b1540e-27c1-43fa-ac4d-3439dbb90f84/Presentation/PublicationAttachment/e24c0ec3-6cc0-4438-a5e6-346dd833e798/CMS_Societas_Europaea_May2011.pdf> accessed 1 May 2015.

²⁹⁸ Provided some standard requirements are met.

inconclusive, standard rules will be applied to the agreement.²⁹⁹ These agreements normally include providing employee representatives with the power to influence decisions taken during board meetings, the company's strategic development³⁰⁰ and often direct supervision.³⁰¹ These employee representatives have the power to recommend, elect, appoint or dispute some or all of the members of the supervisory board and administrative board (provided these powers were conferred in the agreement for employee involvement rights during the negotiations procedure).

The final report on the 'Study on the operation and the impacts of the Statute for a European Company (SE)' concluded that the ECS enhances domestic laws on employee involvement, and this enhancement is multi-faceted.³⁰² The SE encourages codetermination within the Member States, and within the SNB there must be a proportional distribution of members with the total employees in the founding companies, establishments and subsidiaries in each Member State. Most of the SEs that were interviewed in this study asserted that the 'SNB was a genuine team-building tool extending its advantages across the participating Member States'.³⁰³ Furthermore, the SE's corporate governance system implies that co-determination is not limited to employees from the Member States with codetermination system; employees from all Member States may have board-level employee representation rights, subject to conditions mentioned previously in this chapter. This has been considered beneficial in EU group-wide structures, as the variety of representatives of a company from different Member States contributes to building 'European employee consciousness'.³⁰⁴ This extension of employee involvement rights from an industrial relations outlook was a major step and a central advancement of employees' rights. For the first time, a board-level employee

²⁹⁹ Pursuant to Article 12 (2) of the SE Regulation, an SE is not registered until the negotiation on arrangement for employee involvement is successfully concluded (per Article 4 of the SE Directive); or there is an agreement to avoid any negotiations or withdraw from already started negotiations (per Article 3(6) of the SE Directive); or the negotiations time scale has expired and yet not agreement has been reached (per Article 5 of the SE Directive).

³⁰⁰ These namely include: (i) creating an SE; (ii) liquidating an SE or subsidiaries linked to it; and (iii) downsizing the number of employees.

³⁰¹ K Máziková and M Hrapko, 'Accounting Harmonization and Market Conditions Under Impact of a European Company' (2008) 3 (2) Management Information Systems 3-9.

³⁰² 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (*Ernst & Young*, 2008)

<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 11 March 2015.

³⁰³ Ibid.

³⁰⁴ Ibid.

representation right on a cross-border level was considered. If a company within a Member State provided board-level representation rights to its employees, it could not deny them to its employees in another Member State.³⁰⁵

Another positive characteristic of the ECS with respect to employee involvement is that it provides a choice of ‘downsizing the size of the supervisory board globalising employee involvement on such supervisory board, subsequently decreasing the trade union’s influence’ on the company’s operations and governance.³⁰⁶ This has been one of the driving factors to establish an SE, as it supposedly ‘increases the productivity of the working process of supervisory body’ – as demonstrated in Allianz SE, BASF SE and Fresenius SE.³⁰⁷

3.4.5 Promoting European branding and EU business culture

Opting for an SE gives the company a symbolic European branding and a European corporate identity. This, along with other positive drivers mentioned earlier, makes the SE an ‘ideal legal form for big international companies and small and medium-sized enterprises as well (with respect to the option for employee participation and corporate governance / management system)’.³⁰⁸ The SE gives companies the option to restructure and uniformly administer their business throughout the Member States and without being restricted to the legal form of each Member State where the company is registered or operates. This would allow businesses to create subsidiaries and holding companies which would be capable of operating business in all Member States. Furthermore, since the bankruptcy, market regulations and tax aspects of a company are left for the laws of the Member State where an SE is

³⁰⁵ Allianz SE is a typical example of an SE which operates throughout the EU and its employees are conferred with information, consultation and board-level representation rights, even where some MS do not encourage these rights.

³⁰⁶ ‘Societas Europaea’ (CMS Legal Services, 2011)

<http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/74b1540e-27c1-43fa-ac4d-3439dbb90f84/Presentation/PublicationAttachment/e24c0ec3-6cc0-4438-a5e6-346dd833e798/CMS_Societas_Europaea_May2011.pdf> accessed 1 May 2015.

³⁰⁷ ‘Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482’ (Ernst & Young, 2008)
<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 11 March 2015.

³⁰⁸ ‘Societas Europaea’ (CMS Legal Services, 2011)

<http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/74b1540e-27c1-43fa-ac4d-3439dbb90f84/Presentation/PublicationAttachment/e24c0ec3-6cc0-4438-a5e6-346dd833e798/CMS_Societas_Europaea_May2011.pdf> accessed 1 May 2015.

registered,³⁰⁹ there is a constant pressure on Member States to improve their business environment and simplify these aspects (as discussed earlier) to attract more companies to be established in their State or from deterring the SEs to move elsewhere.³¹⁰

3.4.6 *Fostering cross-border communication*

The ECS fosters cross-border communication. It leaves most provisions to be interpreted by individual Member States. The creation of SE requires that many aspects will be dealt with by a Member State's domestic legislation. Issues like "the national company law provisions on mergers of both (or all) of the companies involved govern the law of each of the merging companies,³¹¹ and with respect to employee participation, it is necessary to determine which law grants more protection".³¹² Therefore, it is not only essential to communicate the application and 'implementation of the SE laws across the Member States, but also translation and communication of overall domestic company law provisions³¹³ will increase'.³¹⁴

3.5 Tax neutrality

The absence of any rules dealing with tax-related issues while setting up an SE has gathered mixed opinions. 'Study on the operation and the impacts of the Statute for a European Company (SE)' argues that this absence of any tax provision is one of the reasons that deters European groups of companies from forming an SE.³¹⁵ The SE Regulation only provides that when the SEs transfer their registered office across the Member State there will be no extra tax incurred, but due to lack of any rules dealing with tax, the SEs are referred to domestic legislation. In practice, many Member States apply a 'liquidation treatment that results in the taxation of the silent reserves and a complete disclosure, when an SE transfers its head office and registered office

³⁰⁹ Some of the complicated aspects of big corporations.

³¹⁰ K Máziková and M Hrapko, 'Accounting Harmonization and Market Conditions Under Impact of a European Company' (2008) 3 (2) Management Information Systems 3-9.

³¹¹ See, Article 23 and Article 24 of the SE Regulation.

³¹² M Siems, 'The impact of the European Company (SE) on legal culture' (2005) 30 European Law Review 433.

³¹³ Including employee involvement rules.

³¹⁴ Ibid.

³¹⁵ Most types of taxes are concerned in this aspect: (i) taxation of transfers of all types; (ii) income tax; (iii) taxation of substance; (iv) SE's capital gains tax; (v) taxation of interests, dividends and royalties; (vi) shareholders taxation; (vii) tax consolidation; (viii) capitalisation issues; (ix) profits taxation of foreign 'permanent establishments' etc.

outside their jurisdiction'.³¹⁶ However, if the SE in question maintains a 'permanent establishment' in its earlier incorporating Member State, then the Member State cannot apply exit taxation.³¹⁷ If 'permanent establishment' remains in the earlier incorporating Member State, then the SE by merger is tax neutral along with any Holding SE, Subsidiary SE and Transformation SE.³¹⁸ Applying exit taxation may be likely in situations where an SE did not preserve a 'permanent establishment' in its earlier incorporating Member State and may be regarded as contradicting with the freedom of establishment, per ECJ decision in *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie*.³¹⁹ A Member State was disallowed to apply exit taxation to an individual's freedom of establishment right and minus needing an association to be maintained with the earlier incorporating Member State.³²⁰ The EC's communication on 'Tax Treatment of Losses in Cross-Border Situations' on exit taxation asserted that a Member State must take measures 'postponing the tax collection unconditionally until the gain is actually recognised'.³²¹ By efficient organisational cooperation, an 'exit state's' tax base can be protected.³²²

On the other hand, Wenz submits that the SE has many tax advantages owing to its specific legal construction and its ability to transfer its registered office across Member States.³²³ Exercising a credit versus exemption system to avoid being doubly taxed internationally, and using a wide-ranging network of tax treaties is one of the positive aspects of the SE. Additionally, an SE may consider offsetting the costs of cross-border 'permanent establishments' and/or subsidiaries from profits

³¹⁶ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (Ernst & Young, 2008)

<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 11 March 2015.

³¹⁷ Ibid.

³¹⁸ M Wenz, 'Taxation of the European Company: Perspectives on Tax Treatment, Planning and Reform' in Gold and others (eds) *The European Company Statute. A new Approach to Corporate Governance* (Oxford University Press 2009) Chapter 9.

³¹⁹ Case C-9/02 *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2409.

³²⁰ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (Ernst & Young, 2008)

<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 11 March 2015.

³²¹ Commission, 'Tax Treatment of Losses in Cross-Border Situations' COM (2006) 824 final.

³²² Ibid.

³²³ M Wenz, 'Taxation of the European Company: Perspectives on Tax Treatment, Planning and Reform' in Gold and others (eds) *The European Company Statute. A new Approach to Corporate Governance* (Oxford University Press 2009) Chapter 9.

incurred by the respective SE in its registered Member State.³²⁴ SE is also advantageous for the avoidance or exercise of supplementary thin capitalisation provisions; transferring assets tax neutrally across Member States between various ‘permanent establishments’; and minimising the tax burden of pending income and capital gains.³²⁵

3.6 Conclusion

This chapter has provided a comprehensive background to the ECS and in that process, identified the existing narratives about the shortcomings and will continue in *Chapter 7- Reviewing the European Company Statute* in suggesting reforms to the ECS. The rationale being to dismiss the standard explanation of shortcomings and subsequently identifying novel solutions to those shortcomings.

SE is still in its raw form, nonetheless, having the potential to augment greater harmonisation within the Member States’ company law, as analysed in *Table 7- Analysing ECS efficiency*³²⁶ and *Section 3.4 The SE as a positive driver to the EU market*³²⁷. Despite reviewing the SE Directive,³²⁸ the EC has not substantially worked towards making any revisions to it, but does accept that it is “essential in the future to work on improving the attractiveness of the SE Statute which could be a key factor towards increasing harmonisation between Member States”.³²⁹ This seems rather contradictory.

The above evaluation of the functioning of the ECS indicates that ECS has in fact established the latest foundation for an appropriate system of employee involvement when considering Article 153 of The Treaty on European Union and the objectives of

³²⁴ Ibid

³²⁵ Ibid.

³²⁶ On the aspects of employee involvement, harmonisation of corporate governance structure, safeguarding various stakeholders’ interests, relocating registered office, activity areas and group reorganisation.

³²⁷ On the aspects of cross-border reorganisation, one-tier and two-tier governance system, the option to freely transfer the SE’s registered office to a different Member State, extension of employee involvement rights, promoting European branding and EU business culture and fostering cross-border communication.

³²⁸ Commission, ‘Communication from the Commission on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees’ COM (2008) 591 final.

³²⁹ ‘The European Company – Frequently Asked Questions’ (*European Commission*, 2004) <http://europa.eu/rapid/press-release_MEMO-04-235_en.htm?locale=en> accessed 9 January 2018.

the ECS. Nonetheless, the intended effect of a European social model by encouraging employee involvement and a revised corporate governance structure has been limited. This is considerable because of the shortcomings identified in *Section 3.3 The efficiency of the SE Directive* and the ECS is not comprehensive, as it fails to encompass other important aspects of EU Company Law (see, *Section 3.5 Tax neutrality*). Thus, this has been the argued as a deterrent for the European groups of companies from forming an SE.³³⁰ Further, the frequent reference by the SE Directive to the laws of the Member States for certain provisions makes it under-enforced, for example, as seen with the interests of creditors' and minority shareholders'.³³¹ The mere figure of 2,757 SEs established in the last decade since the ECS came into force puts these shortcomings into perspective.

³³⁰ See, *Section 3.5 Tax neutrality*

³³¹ See, *Section 3.3 The efficiency of the SE Directive*.

CHAPTER 4- LESSONS FROM THE GERMAN MODEL OF CORPORATE GOVERNANCE

4.1 Introduction

Corporate governance is widely defined as ‘the methods by which finance suppliers to corporations guarantee themselves of getting a yield on their investment’.³³²

Corporate governance has historically been perceived to focus either on maximising shareholders’ value or recognising the interests of certain stakeholders. There is no common definition of corporate governance; there are many types and it has been said ‘there are as many corporate governance structures as there are nations’.³³³

This global variation in corporate governance is also reflected in the level of board-level employee representation of corporations.³³⁴ Countries like Germany, France and Japan have been considered as “humane versions of capitalism or stakeholder capitalism”, as they have strong employee representation rights in their corporate governance structures.³³⁵

Employees’ representation at board level is now a fundamental aspect of corporate governance in the EU. EU legislators have been moving in the direction of social welfare. The EU has made two major attempts to establish an appropriate single corporate governance model: first, by the introduction of the Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance; and secondly, by introducing the SE as a new EU company form. Since the 2008 financial crisis, governments, analysts and legal scholars in the EU and the US have begun to examine corporate governance afresh, particularly to establish the roots of the financial turbulences.³³⁶

³³² A Shleifer and RV Vishny, ‘A Survey of Corporate Finance’ (1997) 52 (2) *Journal of Finance* 737.

³³³ Ö Beyazit, ‘Comparison of the Corporate Governance Models of the United States, the United Kingdom and Germany’ (2014) 5 (1) *Law & Justice Review* 260.

³³⁴ LL Rippey, ‘Alternatives to the United States’ System of Labor Relations: A Comparative Analysis of the Labor Relations Systems in the Federal Republic of Germany, Japan, and Sweden’ (1988) 41 *Vanderbilt Law Review* 627-658.

³³⁵ ES Adams, ‘Corporate Governance After Enron and Global Crossing: Comparative Lessons for Cross-National Improvement’ (2003) 78 (2) *Indiana Law Journal* 724.

³³⁶ D Hummel, ‘The Corporate Governance of Banks- Lessons Learned from the Financial Crisis’ (2013) *Universität Potsdam* 179.

For the purpose of this research and this chapter, Germany's model of corporate governance will be analysed in detail. The prime reason for studying the German model of corporate governance is that it has had considerable economic success arguably because of its corporate governance system. The International Monetary Fund (IMF) reports Germany's gross domestic product (GDP) for 2015 to be \$3.473 trillion, which is Europe's largest economy.³³⁷ Germany's GDP value represents 6.21% of the world economy.³³⁸ The German model of corporate governance has been regarded as the model for the rest of the EU, especially with regard to its works councils and co-determination.³³⁹ This chapter will analyse how the German model has influenced the issue of employee involvement in EU corporations. Germany's position provides a prominent example of board-level employee representation (quasi-parity board representation of companies with more than 2000 workers). A company is managed by employee representatives, in addition to the directors appointed by the shareholders, and there is an inclination towards stakeholder value rather than shareholders' value. The German situation demonstrates that board-level employee representation reduces company-employee agency costs. This chapter will argue that an ideal corporate governance system (as implemented in Germany) effectively mitigates agency conflicts by increasing efficiency and promoting the normative goal of cumulative social welfare.

The strengths and weaknesses of the German model will be studied. The study of German corporate governance of its employees may provide lessons to deal with the governance, economic and social issues for the rest of the EU. The German 'Mitbestimmung' (codetermination) might provide an ideal framework for board-level employee representation, which, if applied uniformly across Member States, will help to encourage employee involvement.

³³⁷ 'Report for Selected Countries and Subjects' (*International Monetary Fund*) <<http://www.imf.org/external/pubs/ft/weo/2015/02/weodata/weorept.aspx?pr.x=38&pr.y=3&sy=2014&ey=2020&scsm=1&ssd=1&sort=country&ds=.&br=1&c=134&s=NGDPD%2CNGDPDPC%2CPPPGDP%2CPPPPC&grp=0&a=>>> accessed 12 August 2015.

³³⁸ 'Germany GDP' (*Trading Economics*) <<http://www.tradingeconomics.com/germany/gdp>> accessed 15 August 2015.

³³⁹ E Gaugler and S Wiltz, 'Germany' in C Brewster and others (eds), *Euro-Dean Guide to Human Resource Management* (Academic Press 1992) 163-228.

4.2 Models of corporate governance

The two most prominent models of corporate governance are the Anglo-American model and the German model. They differ substantially and provide different solutions to corporate governance issues: for example, innovation and oversight, crisis management, and shareholder activism. They also differ in the risk oversight they supply to more strategic topics like board composition, including employee involvement and corporate strategy.³⁴⁰

The Anglo-American model of corporate governance is a 'pure liberal model'.³⁴¹ The model applies principles of capitalism and liberalism. Thus, the Anglo-American model has a dominant CEO in a single board, which governs the company and is primarily concerned with maximising shareholder value.³⁴²

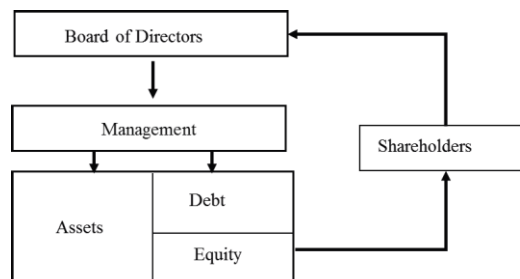


Figure 1- Anglo-American model³⁴³

The German model, on the other hand, is based on the concept of 'industrial partnerships'.³⁴⁴ It includes a principle of social responsibility by taking into account the interests of stakeholders (including employees) as well as maximising shareholder value. The German model provides unambiguous and set board level employee representation rights, making employees key stakeholders in the management of a company. The number of employee representatives depends on the size of the company (quasi-parity board representation of companies with more than 2000 workers).

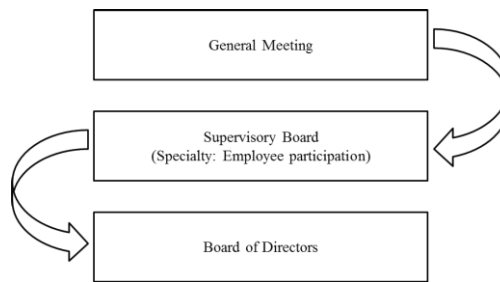
³⁴⁰ D Hummel, 'The Corporate Governance of Banks- Lessons Learned from the Financial Crisis' (2013) Universität Potsdam 179-180.

³⁴¹ Ö Beyazit, 'Comparison of the Corporate Governance Models of the United States, the United Kingdom and Germany' (2014) 5 (1) Law & Justice Review 259-278.

³⁴² Ibid.

³⁴³ D Hummel, 'The Corporate Governance of Banks- Lessons Learned from the Financial Crisis' (2013) Universität Potsdam 179.

³⁴⁴ Ibid.



*Figure 2- German model*³⁴⁵

In the German corporate governance system, social responsibility is embedded at the very core of a company's legal definition. Article 14 (2) of the German Federal Constitution promotes the philosophy of a 'social market' and the 'social governance of markets'³⁴⁶; it provides that 'property demands responsibilities and its usage should also function for the public wealth.'³⁴⁷ This model is thus instrumental in achieving the objectives of the EU's 'social model'.

4.3 Dualistic board structure

There are two corporate governance systems in the EU: a monistic board structure and a dualistic board structure. These structures are the major features distinguishing one corporate governance system from another. The monistic board structure has a single board of directors (administrative organ), which governs the company. The dualistic board structure has a management board (governing the company) and the supervisory board (monitoring and governing the management board). The supervisory board can also appoint and terminate the management.³⁴⁸

Before the introduction of the SE, companies relied on the domestic legal rules that would determine the type of corporate governance systems in each Member State. *Figure 3- Monistic and dualistic board structure map of EU* below depicts the main corporate governance systems now prevalent in each Member State. Member States like Ireland, the UK and Greece have a strong monistic board structure and in

³⁴⁵ D Hummel, 'The Corporate Governance of Banks- Lessons Learned from the Financial Crisis' (2013) Universität Potsdam 180.

³⁴⁶ JE Dixon, *Responses to Governance: Governing Corporations, Societies and the World* (Praeger 2003) 93.

³⁴⁷ AD Clarke, 'German Corporate Governance Provision For Employees: Lessons For Australia?' (2006) 10 Southern Cross University Law Review 7.

³⁴⁸ AF Conard, 'Comparative Law: The Supervision of Corporate Managements: A Supervision of Developments in European Community and United States Law' (1984) 82 Michigan Law Review 1459.

Member States like Netherlands, Germany and Austria dualistic board structures are more prevalent. However, Member States like Belgium, France, Finland, Hungary, Italy Spain and Portugal leave it to the discretion of individual companies to choose between the two corporate governance systems.

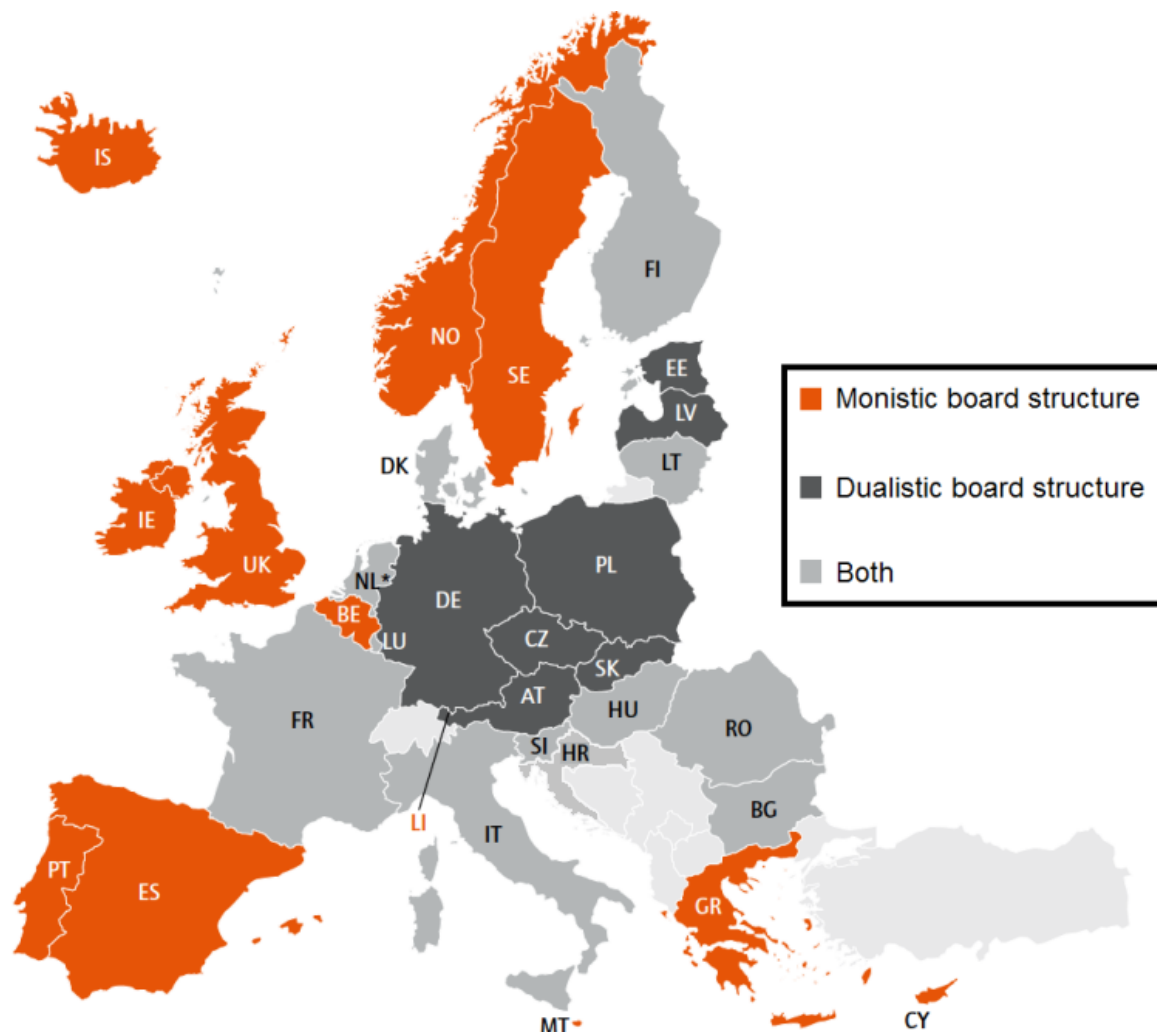


Figure 3- Monistic and dualistic board structure map of EU

The dualistic board structure is a paradigm of stakeholder theory in corporate governance. According to this paradigm, a company must seek to do more than maximise shareholder value; a company belongs also to all its stakeholders: employees, suppliers, creditors, customers and indeed government. Viable economic governance can be achieved by taking into account the interest of all the stakeholders.³⁴⁹

³⁴⁹ Ö Beyazit, 'Comparison of the Corporate Governance Models of the United States, the United Kingdom and Germany' (2014) 5 (1) Law & Justice Review 259-278.

The dualistic board structure and board-level employee representation are two prominent features of German corporate governance. The German corporate governance structure provides that the shareholders elect the supervisory board members who are detached from the management board.³⁵⁰ The structure is mostly evident in AG / Aktiengesellschaft (public limited company).

The dualistic board structure is convoluted. Structural issues mostly stem from tensions between social independence and industrialisation, as the supervisory board consists of employee representatives who have their own agenda, which does not always necessarily align with that of the company.³⁵¹ This explains why stakeholder theory is not universally acceptable: it provokes property rights objections and raises the possibility of stakeholders abusing their position and disregarding a company's objectives to serve their own interests (as discussed in *Chapter 2- Justifying Employee Involvement in Corporate Governance*).³⁵²

4.4 Codetermination: An ideal corporate governance feature of the EU

Legal scholars regard German codetermination as a 'model' for the EU. It is 'extensive and involves employee involvement in almost entire company policies'.³⁵³ Lahovary quotes Overbeck³⁵⁴ in providing a condensed definition of codetermination: 'a structured employee involvement or by their representatives in formulating company's objectives and decision-making'.³⁵⁵

³⁵⁰ RI Tricker, *Pocket Director: The Essentials of Corporate Governance from A to Z* (Economist Books 1996) 20.

³⁵¹ AD Clarke, 'German Corporate Governance Provision For Employees: Lessons For Australia?' (2006) 10 Southern Cross University Law Review 15.

³⁵² JW Salacuse, 'Corporate Governance in New Century' (2004) 25 (3) Company Lawyer 69-83.

³⁵³ L Holden, 'Chapter 13: Employee involvement and empowerment', in I Beardswell and L Holden (eds), *Human Resource Management: A Contemporary Approach* (4th edn, Pearson Education Limited 2001) 584.

³⁵⁴ E Overbeck, 'Co-determination at company level' in W Engels and Pohl Hans (eds), *German Yearbook on Business History* (Springer 1984) 11-17.

³⁵⁵ C Lahovary, 'Chapter 2- Employee Representation, Codetermination, And Business Performance' (ESRC Centre for Business Research, University of Cambridge)
<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.9577&rep=rep1&type=pdf>> accessed 14 August 2015.

German law provides that 'employees have control rights via supervisory board'³⁵⁶ over corporate assets and they oversee the management board'³⁵⁷ (participating in decision-making duties, appointing executive directors, setting salaries etc.).³⁵⁸

Germany has legally embodied codetermination in its corporate governance in the following acts: (i) Act on the Co-determination of Employees in the Supervisory Boards and Boards of the Mining and Iron-Steel Industry 1951; (ii) Works Council Constitution Act 1952; (iii) Works Council Constitution Act 1972; (iv) Codetermination Act 1976; and (v) One Third Participation Act 2004.

The Iron, Coal and Steel Codetermination Act of 1951 provide that the composition of the supervisory board includes the same number of employee representatives and shareholders, along with one neutral member as a vote tie-breaker. Also, on the management board there is an employee director.

The Works Council Constitution Act 1952 specifies that there will be one-third employee representation on the supervisory board if a company has more than 500 employees, but fewer than 2000 employees. It also identifies the companies that are exempt from codetermination. These include family-owned stock companies with fewer than 500 employees; companies within the media sector; and companies that follow educational, labour movement, political, artistic, religious or charitable interests, or companies with similar interests.

The Codetermination Act 1976 lays down provisions for equal representation on the supervisory board for shareholders and employees for companies with more than 2000 employees. The management board includes one employee director and the supervisory board's chairperson is appointed from the shareholders' representative who acts as an additional voting tie-breaker.³⁵⁹ Codetermination functions at

³⁵⁶ Non-executive directors.

³⁵⁷ Executive directors.

³⁵⁸ G Gorton and F Schmid, 'Capital, Labor and the Firm: A Study of German Codetermination' (2004) 2 Journal of the European Economic Association 866-868.

³⁵⁹ T Baums, 'Corporate Governance Systems in Europe- Differences and Tendencies of Convergence' (Crafoord Lecture, University of Osnabrück)
<<http://www.jura.uni-frankfurt.de/43029401/paper37.pdf>> accessed 12 August 2015.

workplace level, plant level and company level; employees can be involved through works councils, the management board and the supervisory board.³⁶⁰

German companies mostly consider codetermination as a positive factor for a company's success. The following table shows that there is considerable support for codetermination at board-level among German private shareholders or investors and executives of companies with one-third codetermination. A survey by Financial Times Deutschland also highlighted that companies like Adidas, TUI, Volkswagen, and Deutsche Telekom were in favour of codetermination.³⁶¹ However, there are mixed views with executives of larger companies with parity or equal codetermination (for example, Commerzbank, SAP).³⁶²

³⁶⁰ L Holden, 'Chapter 13: Employee involvement and empowerment', in I Beardswell and L Holden (eds), *Human Resource Management: A Contemporary Approach* (4th edn, Pearson Education Limited 2001) 584.

Although, some authors only classify works councils and supervisory boards as the two types of German codetermination. For example, S Prigge, 'A Survey of German Corporate Governance' in KJ Hopt and others (eds), *Comparative Corporate Governance- The State of the Art and Emerging Research* (Oxford University Press 1998) 1004.

³⁶¹ T Paster, 'Do German employers support board-level codetermination? The paradox of individual support and collective opposition' (2011) 10 Socio-Economic Review 485.

³⁶² Ibid.

<i>Target people</i>	<i>Findings</i>
German private shareholders / investors	63% consider codetermination as an advantage. ³⁶³
Executives of companies with parity / equal codetermination	38% consider codetermination as a disadvantage. ³⁶⁴ 34% consider codetermination as an advantage. ³⁶⁵
Executives of companies with one-third codetermination	57% consider codetermination as an advantage. ³⁶⁶ 19% consider codetermination as a disadvantage. ³⁶⁷
Executives of medium-sized companies on negative factors for their firm ³⁶⁸	18% consider external union representatives to be a negative factor. ³⁶⁹ 15% consider works councils to be a negative factor. ³⁷⁰ 82% consider high non-wage labour costs to be a negative factor. ³⁷¹ 84% consider bureaucracy to be a negative factor. ³⁷²

*Table 8- Survey on co-determination*³⁷³

However, codetermination in its current form may be outdated or require major revisions. The Federation of German Industry (BDI) and Confederation of German Employers' Associations (BDA) rejected a positive report on codetermination by Biedenkopf-Kommission II (commission set by the German government) for the following reasons:³⁷⁴ (i) a board's decision-making process gets obstructed and decelerated by codetermination; (ii) Many large companies consider codetermination as blunting Germany's competitive edge on international financial markets,³⁷⁵ and

³⁶³ UV Papendick, 'Votum für die Mitbestimmung' (*manager magazin*, Hamburg, 2004) <<http://www.manager-magazin.de/unternehmen/boersenbarometer/0,2828,332652,00.html>> accessed 11 July 2015.

Survey conducted by TNS Emnid for 'manager magazin' 2004.

³⁶⁴ Survey conducted by Cologne Institute for Economic Research and the Institute for Law and Finance at the University of Frankfurt, 2006

³⁶⁵ Ibid

³⁶⁶ 'Unternehmensmitbestimmung: Ablehnung u"berwiegt' (IW Pressemitteilung No. 45, Cologne, 2006) <<http://www.iwkoeln.de/Portals/0/PDF/pm4506.pdf>> accessed 11 July 2015.

³⁶⁷ Ibid.

³⁶⁸ Medium sized companies are referred to companies with <2000 employees, therefore only subject to one-third codetermination.

³⁶⁹ VH Müller, 'Fertig zum Salto globale?' (*manager magazin*, Hamburg 2005) <<http://www.manager-magazin.de/magazin/artikel/a-380700.html>> accessed 23 July 2015.

³⁷⁰ Ibid.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ T Paster, 'Do German employers support board-level codetermination? The paradox of individual support and collective opposition' (2011) 10 Socio-Economic Review 483-484.

³⁷⁴ 'Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung' (*Bericht der wissenschaftlichen Mitglieder der Kommission*, Berlin, 2006) <https://www.boeckler.de/pdf/mbf_biedenkopfkommission.pdf> accessed 26 July 2015.

³⁷⁵ K Bock (BASF's Chief Financial Officer) made a public comment labelling codetermination as conferring a competitive disadvantage.

K Bock, 'Zeit für den Abspann: Die Cromme-Kommission hat ihre Arbeit getan. Mit Erfolg. Jetzt sollte man sie auflösen und die Reform der Unternehmensmitbestimmung vorantreiben' (*Die Welt*, 2005) 10.

(iii) codetermination is often considered an obstacle by companies involved in cross-border mergers.³⁷⁶

Research scholars, academics and economists have also reached mixed conclusions on the viability of codetermination and its effect on business performance. A number of studies have come out in support of codetermination as a positive contributor to company success. Kraft and Stank's research established that codetermination had a positive effect on company's innovation with one-third board level employee representation.³⁷⁷ Kraft and Ugarkovic's research concluded that companies with one-third board level employee representation had a positive equity return for their shareholders.³⁷⁸ Renaud writes that a company with one-third board level employee representation yields more profit.³⁷⁹ Rogers and Streeck maintain that 'as a result of temporary veto given to employees under codetermination, German company's management is protected from constricted, temporary reactions to market signals and making them avoid financial blunders by losing reflection'.³⁸⁰ Other studies that support codetermination say that it is positive for a company's efficiency on awarding dividends and market value, e.g. Fauver and Fuerst (2006),³⁸¹ Frick and Bermig (2009),³⁸² Debus (2010),³⁸³ and Balsmeier et al. (2011).³⁸⁴

³⁷⁶ H-O Henkel, 'Wettbewerb und Mitbestimmung' (1999) 50 Gewerkschaftliche Monatshefte 146-149.

³⁷⁷ K Kraft and J Stank, 'Die Auswirkungen der gesetzlichen Mitbestimmung auf die Innovationsaktivität deutscher Unternehmen' (2004) 3 Schmollers Jahrbuch 421-449.

³⁷⁸ K Kraft and M Ugarkovic, 'Gesetzliche Mitbestimmung und Kapitalrendite' (2006) 226 (5) Jahrbücher für Nationalökonomie und Statistik 588-604.

³⁷⁹ S Renaud, 'Dynamic Efficiency of Supervisory-Board-Codetermination in Germany' (2007) 21 (4-5) Labour 689-712.

³⁸⁰ J Rogers and W Streeck, 'Workplace representation overseas: The works councils story' in RB Freeman (ed) *Working under Different Rules* (Russel Sage Foundation 1994).

³⁸¹ L Fauvera and ME Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards' (2006) 82 Journal of Financial Economics 673-710.

³⁸² B Frick and A Bermig, 'Mitbestimmung und Unternehmensperformance: Der Einfluss von Arbeitnehmervertreter im Aufsichtsrat auf Unternehmenswert und operative Entwicklung' (2009) University of Paderborn Working Paper University of Paderborn
<<http://www.fes.de/wiso/pdf/abp/2010/251010/governance-und-performance-fes.pdf>> accessed 18 October 2015.

³⁸³ M Debus, *Evaluation des Aufsichtsrats: Theoretische Grundlagen und empirische Befunde* (Springer Gabler 2010).

³⁸⁴ Balsmeier et al., 'Corporate Governance and Employee Power in the Boardroom. An Applied Game Theoretical Analysis' (2011) Diskussionspapier des Instituts für Organisationsökonomik 9/2011
<<https://134.245.92.14/dspace/bitstream/10419/50009/1/669146242.pdf>> accessed 2 October 2015.

Freeman and Lazear claimed that codetermination has increased job security in Germany.³⁸⁵ The unemployment rate at the time of their research in Germany was 8.2% in 1995.³⁸⁶ The current unemployment rate in Germany is 5.2%.³⁸⁷ The lower unemployment rate at the time in comparison with other Member States in the EU, and a further drop in two decades supports their conclusion.

Other studies have less positive conclusions. Gorton and Schmid do not completely dismiss the positivity of codetermination but suggest that parity level board representation destroys firm value in comparison with one-third board level employee representation.³⁸⁸ FitzRoy and Kraft in 'Economic Effects of Codetermination' (1993) concluded that a German company's productivity and profitability is negatively affected by codetermination, where employee representation is half of the board composition.³⁸⁹ But, their next research over a decade later, 'Co-determination and efficiency' (2005), concluded that codetermination has no substantial adverse effects on German companies' productivity.³⁹⁰

Similarly, Bohren and Strøm in 'The value-creating board: Theory and evidence' (2005) claimed that codetermination has a negative effect on the company's efficiency,³⁹¹ but Strøm in 'Better Firm Performance with Employees on the Board? Not in the Long Run' (2007) had almost a positive conclusion.³⁹²

³⁸⁵ B Freeman and P Lazear, 'An economic analysis of works council' in J Rogers and W Streeck (eds), *Works Councils: Consultations, Representation, and Cooperation in Industrial Relations* (University of Chicago Press 1995).

³⁸⁶ 'World Economic Outlook data' (IMF) <<http://www.econstats.com/weo/V027.htm>> accessed 23 August 2015.

³⁸⁷ Ibid.

³⁸⁸ G Gorton and F Schmid, 'Capital, Labor and the Firm: A Study of German Codetermination' (2004) 2 *Journal of the European Economic Association* 863, 878-879.

³⁸⁹ F FitzRoy and K Kraft, 'Economic Effects of Codetermination' (1993) 95 (3) *The Scandinavian Journal of Economics* 365-375.

³⁹⁰ F FitzRoy and K Kraft, 'Co-determination, Efficiency and Productivity' (2005) 43 (2) *British Journal of Industrial Relations* 233-247.

³⁹¹ Ø Bøhren and Ø Strøm, 'The value-creating board: Theory and evidence' (Oslo: BI Norwegian School of Management, Research Report No 8, 2005) <http://finance.bi.no/~bernt/governance/Report_Boards.pdf> accessed 8 October 2015.

³⁹² Ø Strøm, 'Better Firm Performance with Employees on the Board? Not in the Long Run' (SSRN Paper, 2007) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=967445> accessed 19 October 2015.

Looking across all these studies, it is difficult to establish a clear correlation between employee involvement and a company's economic success because research conducted at different times, in different economic climates, will yield different results.

Some studies suggest that employee representation allows employees to influence the management of a company positively. Gorton and Schmid, for example, conceptualise codetermination as the effective cooperation in running a company between equity capital suppliers and suppliers of employees.³⁹³ They also suggest that codetermination allows employees to monitor management, who do not always act in the outside shareholders' best interests. Employees can also safeguard their interests against the possibility of shareholders' opportunistic behaviour.³⁹⁴ Employee involvement in German companies encourages dialogue, thereby ensuring that employees' interests are articulated and conflict is handled in an organised manner. Codetermination rights increase employees' power: employees are well placed to facilitate the cooperative authority applied by management and the board's inspiration to protect the influence of shareholders.³⁹⁵ Employees also have a dominant negotiating position over rents-related decisions, as they have the right to veto over working hours.³⁹⁶

Some objections to codetermination have been raised. Owing to strong employees' power under codetermination rights, for example, management boards are often antagonistic about codetermination, but there have never been serious attempts to revise the Works Council Constitution Act 1972. This could be due to the net

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ LA Wedderburn, 'Employees, Partnerships and Company Law' (2002) 99 (31) *International Law Journal* 113-170.

³⁹⁶ B Freeman and P Lazear, 'An economic analysis of works council' in J Rogers and W Streeck (eds), *Works Councils: Consultations, Representation, and Cooperation in Industrial Relations* (University of Chicago Press 1995).

economic benefits of joint decision-making.³⁹⁷ Ziegler identifies this factor to be a reflection of 'radical workplace democracy' and 'constitutionalism'.³⁹⁸

Notwithstanding this, codetermination may introduce some agency problems that it was meant to mitigate; as employees may further their interests of maximising their salary rather than the company's stock value, and a situation will be created where monitors need monitoring.³⁹⁹

That being said, apart from a few objections (for example, property right objections and potential agency costs), codetermination remains the most important feature of the German corporate governance system. It may be a significant contributor to Germany becoming the world's richest country⁴⁰⁰ by 2030, as predicted by Dirk Heilmann's book 'Fat Years: Why Germany has a Brilliant Future'.⁴⁰¹

It is difficult to assess the economic effects of codetermination empirically in countries other than Germany. Clarke suggests that codetermination has not been adopted by the 'Anglo-American model or other models because the economic effects of codetermination cannot be empirically checked and cross-checked'.⁴⁰² Clarke quotes Gerum and Wagner to suggest that 'it is enormously difficult for the supervisory board to check codetermination's economic effect empirically as almost all large German corporations have codetermination, thus there is no way to compare companies with and without codetermination'.⁴⁰³ Due to the 'substantial influence of company size on productivity, comparison with small companies would be futile'.⁴⁰⁴ Comparing codetermination internationally is not easy because of the 'doubt that other institutional and economic factors may well be influencing the

³⁹⁷ C Lahovary, 'Chapter 2- Employee Representation, Codetermination, And Business Performance' (ESRC Centre for Business Research, University of Cambridge) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.9577&rep=rep1&type=pdf>> accessed 14 August 2015.

³⁹⁸ JN Ziegler, 'Corporate Governance and the Politics of Property Rights in Germany' (2000) 28 *Politics & Society* 195-221.

³⁹⁹ L Fauvera and ME Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards' (2006) 82 *Journal of Financial Economics* 683-684.

⁴⁰⁰ In terms of income per head.

⁴⁰¹ 'Germany's economic model- What Germany offers the world' *The Economist* (14 April 2012) <<http://www.economist.com/node/21552567>> accessed 12 October 2015.

⁴⁰² AD Clarke, 'German Corporate Governance Provision For Employees: Lessons For Australia?' (2006) 10 *Southern Cross University Law Review* 20-21.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

comparison of codetermination's efficiency (i.e. trade union's economic rationality, employees' high usual qualifications, exchange rate, social culture, GDP)'.⁴⁰⁵ These arguments conclusively assert that it is difficult to assess the economic effects of codetermination empirically, but there has been indication so far that it has a positive impact on the economic performance of companies in Germany. Therefore, this in conjunction with the social rationales for codetermination serves as an ideal model for the debate about employee involvement in the EU context.

4.5 Minimal agency costs in German corporate governance model

Conflicts of interest between company players have been denoted by economists as 'agency problems' or 'principal-agent' problems.⁴⁰⁶ Company law in Germany operates to manage these conflicts of interest. The key documents are:⁴⁰⁷ (i) the German Corporate Governance Code (Deutsche Corporate Governance Kodex); (ii) the German Stock Corporation Act 1965 (Aktiengesetz); (iii) the Civil Code of Germany (Bürgerliches Gesetzbuch); and (iv) the Codetermination Act 1976 (Mitbestimmungsgesetz).

The measures taken by Germany have created a corporate governance structure that, if adopted across the EU, can mitigate agency costs.

An agency relationship can be any contractual relationship, under which one or more individuals (agent) undertakes the performance of services to another (principal).⁴⁰⁸ Any agency relationship can lead to agency costs. An agency cost can be described as 'the totality of the agent's bonding expenditures, principal's monitoring expenditures and the residual loss'.⁴⁰⁹ Agency costs are incurred when the shareholders' objectives and that of the management do not align; where there is information asymmetry between the shareholders and the management; where there is divergence of control; and finally, where there is separation of control and

⁴⁰⁵ Ibid.

⁴⁰⁶ Armour et al., 'Agency Problems and Legal Strategies' in R Kraakman and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 35-54.

⁴⁰⁷ Economic and Social Research Council, 'Directors' Duties: Empirical Findings, Report to the Law Commissions' (1999) <http://lawcommission.justice.gov.uk/docs/lc261_Company_Directors_ESRC_Research.pdf> accessed 19 August 2015.

⁴⁰⁸ M Jensen and W Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 308.

⁴⁰⁹ B Pettet, *Company Law* (2nd edn, Longman 2005) 70-71.

ownership.⁴¹⁰ Germany's financial market is inescapably affected by the corporate governance system of its companies. Therefore, its dualistic board corporate governance system is designed to reduce the agency costs between the company players.⁴¹¹

The type of agency costs incurred largely depends on the ownership structure of the company: (i) agency costs are increased by non-managing shareholders; (ii) external managers incur huge agency costs; (iii) if banks monitor the company then the agency costs are significantly lower; and (iv) agency costs differ inversely with directors' ownership share.⁴¹²

In addition, agency costs are minimal in a family-owned company. In contrast, a public limited company in Germany (AG / Aktiengesellschaft) potentially raises managerial agency costs to shareholders, for example,

*“...by pushing managers to choose strategies that they and employees, but not shareholders, prefer. This is based on another German firm assumption that ‘managers have a well-known propensity to expand firms in ways that do not benefit shareholders, but rather favour themselves (and incumbent employees).”*⁴¹³

A German company, like any other, has a single legal personality but various organs: first, the executive directors who manage the company; second, the non-executive directors who supervise the management; and third, shareholders who own the company. Although employee representatives (supervisory board) and the directors (management board) have the potential to incur agency costs (for the reasons discussed in *Section 4.4 Codetermination: An ideal corporate governance feature of the EU*), German corporate governance tends to focus on two major agency problems: shareholders and the management; and majority shareholders and the minority shareholders.⁴¹⁴

⁴¹⁰ 'Companies Act 2006: Regulatory Impact Assessment' (2007)
<<http://www.bis.gov.uk/files/file29937.pdf>> accessed 03 August 2015.

⁴¹¹ RE Krainer, *Corporate Finance, Governance, and Business Cycles: Theory and International Comparisons* (JAI Press 2003) 126.

⁴¹² Ibid.

⁴¹³ AD Clarke, 'German Corporate Governance Provision For Employees: Lessons For Australia?' (2006) 10 Southern Cross University Law Review 20.

⁴¹⁴ A disperse ownership structure widely exists in Anglo-Saxon countries such as the UK. The dispersed shareholders do not essentially have the authority to collectively decide on collective

The first agency problem dealt by the German corporate governance is between the shareholders and the management.⁴¹⁵ The basic concept is that if shareholders own the shares in the company and the management employed by them manages the company, then the management will potentially do what is in the company's best interests, and subsequently to the benefit of the shareholders. The dilemma lies in promising that the management (agents) are receptive to the shareholders' (principal) best interests, as opposed to seeking their own personal gains.⁴¹⁶ Clarke argues that, in Germany, "managers have a well-known propensity to expand firms in ways that do not benefit shareholders, but rather favour themselves (and incumbent employees)."⁴¹⁷ Due to the marginal contribution to a company's performance by its shareholders, which is hard to measure, the governance system typically distributes residual control to the shareholders.

The second agency costs can arise between the majority shareholders (agents) and the minority shareholders (principals).⁴¹⁸ Agency costs can be incurred when the minority shareholders are advantaged from their power to veto management decisions.⁴¹⁹ Similarly, majority shareholders can influence directors' decisions (as they possess appointment / removal rights) that may affect the minority shareholders' interests. Thus, minority shareholders' rights may be compromised and interests restricted by the directors under the influence of the majority shareholders.

policies in company dealings. UK economists and legislators are more interested in reforming the national governance structure: (i) to minimise the agency costs between primarily the management and the shareholders; and (ii) restrict the management's power for company's best interest. If the shareholders' body is considerably weak, then the directors become too controlling and subsequently decisions cannot be coordinated due to this dispersed nature. If directors do perform their responsibilities well or in alignment with the interest of the shareholders then it becomes hard to exercise removal rights to remove the directors as the majority vote is problematic to coordinate. Additionally, the majority shareholders and minority shareholders agency costs will be considerably lower in reality as the shareholders' majority will all be some kind of minority since they are all dispersed and have problems in coordinating with each other.

⁴¹⁵ Armour et al., 'Agency Problems and Legal Strategies' in R Kraakman and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 35-54.

⁴¹⁶ Ibid.

⁴¹⁷ AD Clarke, 'German Corporate Governance Provision For Employees: Lessons For Australia?' (2006) 10 Southern Cross University Law Review 20.

⁴¹⁸ Armour et al., 'Agency Problems and Legal Strategies' in R Kraakman and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 35-54.

⁴¹⁹ Ibid.

German corporate governance plays a substantial role in minimising these agency costs. With respect to the shareholders and the management agency costs, there are three main approaches designed to mitigate these costs: (i) shareholders exercising the appointment and removal rights for the directors; (ii) subjecting directors to legal accountabilities, which obliges them to apply their discretion in the interest of the shareholders; and (iii) organising the incentives of the members of the board, thus motivating them to further the interest of the shareholders.⁴²⁰

The German corporate governance model observes two legal strategies when addressing agency problems: governance strategies and regulatory strategies. Governance strategies streamline principals' control over the behaviour of the agents and their effectiveness relies on the principals' proficiency to exercise their control rights. Regulatory strategies have rigid characteristics and command substantive terms that manage the agent-principal relationship by limiting the agent's behaviour. Regulatory strategies rely on the capacity of an external authority (e.g. regulatory bodies or the court) to determine whether an agent discharged their designated duties.⁴²¹

The tables below list the six governances and four regulatory strategies for protecting principals:

	<i>Appointment Rights</i>	<i>Decision-making Rights</i>	<i>Agent Incentives</i>
Ex Ante	Selection	Initiation	Trusteeship
Ex Post	Removal	Veto	Reward

*Table 9- Governance strategies for principal's protection*⁴²²

	<i>Agent constraints</i>	<i>Affiliation terms</i>
Ex Ante	Rules	Entry
Ex Post	Standards	Exit

*Table 10- Regulatory strategies for principal's protection*⁴²³

⁴²⁰ 'The Board of Directors: Composition, Structure, Duties and Powers' (*Organisation for Economic Co-operation and Development*, 2000) <<http://www.oecd.org/dataoecd/21/30/1857291.pdf>> accessed 10 October 2015.

⁴²¹ Davies et al., 'Beyond the Anatomy' in Kraakman R and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 305-316.

⁴²² Ibid

⁴²³ Ibid

Furthermore, 'governance structures' together with 'executive compensation' serves to mitigate agency costs by safeguarding shareholders' best interests and confirming the principal-agent-interest association.⁴²⁴ Directors' liability also minimises agency problems by coordinating shareholder interests with directors' inducements (although it has been argued that directors' liability is relatively less effective in limiting directors' activities).⁴²⁵

When dealing with the majority-minority shareholders relationship, Davis et al. suggest that the match between ownership structure and minority shareholders protection has weakened considerably.⁴²⁶ However, corporate governance systems across the EU have recognised that minority shareholders' statutory protection is an established policy to encourage external investment.⁴²⁷ A functional governance mechanism secures minority shareholders' board level representation, making it possible for minority shareholders to be well aware of a board's actions and persuade the board to acknowledge their interests as well.⁴²⁸ For example, minority shareholders in German companies have been progressively and emphatically exercising their rights to challenge board resolutions that may potentially be unfavourable to their interests.⁴²⁹ Similarly, Italy now gives minority shareholders the right to elect a director on to a listed company's board. Model legal restrictions on the majority shareholders' capacity to expropriate minority shareholders should increase the price at which shares may be traded to minority shareholders, consequently minimising the cost of external equity capital for companies.⁴³⁰

⁴²⁴ Davis et al., 'Towards a Stewardship Theory of Management' (1997) 22 *Academy of Management Review* 22.

⁴²⁵ 'Directors' Duties and Directors' Liabilities' (*Organisation for Economic Co-operation and Development*, 2002) <<http://www.oecd.org/dataoecd/1/0/2085788.pdf>> accessed on 21 October 2015.

⁴²⁶ Davies et al., 'Beyond the Anatomy' in Kraakman R and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 305-316.

⁴²⁷ BS Black, 'The Core Institutions That Support Strong Securities Markets' (2000) 55 *Business Lawyer* 1565.

⁴²⁸ 'The Board of Directors: Composition, Structure, Duties and Powers' (*Organisation for Economic Co-operation and Development*, 2000) <<http://www.oecd.org/dataoecd/21/30/1857291.pdf>> accessed 10 October 2015.

⁴²⁹ Davies et al., 'Beyond the Anatomy' in Kraakman R and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 305-316.

⁴³⁰ Armour et al., 'Agency Problems and Legal Strategies' in R Kraakman and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 35-54.

Disclosure is also another significant aspect of German corporate governance that helps reducing agency costs. It exposes possibly challenging transactions, thus dispensing information to the potential litigants for legal proceedings and can also be purposeful on to decision-making rights on the board.⁴³¹

Lastly, the financial accounting system can further mitigate agency costs.⁴³² Financial accounting in corporate governance provides creditors, shareholders and external directors with substantial information for monitoring the management.⁴³³ If the information asymmetries between the management directors, external directors, creditors, shareholders and other stakeholders are left unmonitored, then the management may be drawn into withholding information that is damaging to their personal interests (for example, taking private perks, suppressing information suggesting inadequate performance).

Corporate governance systems must also to 'a certain extent' recognise the interests of business parties and other stakeholders, in addition to the two major agency issues discussed above.⁴³⁴ Agency costs can be incurred between the company and these stakeholders (creditors, employees, or the community), because it is hard to guarantee that the company (agent) does not operate opportunistically towards its principals (for example by expropriating creditors or exploiting employees).⁴³⁵ The stress has been put on the phrase 'to a certain extent' as an ideal corporate governance structure does not or should not completely recognise business parties and stakeholders rights: the purpose of the company could be defeated by putting the interests of business parties and stakeholders before the company's interests.

⁴³¹ Ibid.

⁴³² 'The Role of Information and Financial Reporting In Corporate Governance and Contracting' (*MIT Sloan School of Management*, 2009) <http://mitsloan.mit.edu/jae/pdf/Session_II_Armstrong_Guay_Weber.pdf> accessed on 11 October 2015.

⁴³³ 'Modern Company Law for a Competitive Economy: The Strategic Framework' (*Company Law Review Steering Group*, 1999) <<http://www.bis.gov.uk/files/file23279.pdf>> accessed on 11 October 2015.

⁴³⁴ 'Traditional And Innovative Approaches To Legal Reform: 'The New Company Law' (2006) The Research Institute of Economy, Trade and Industry Discussion Paper 07-E-033 <<http://www.rieti.go.jp/jp/publications/dp/07e033.pdf>> accessed 29 October 2015.

⁴³⁵ Armour et al., 'Agency Problems and Legal Strategies' in R Kraakman and others (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) 35-54.

Additionally, it can be argued that there are already sufficient functional laws and governance mechanisms in place to protect these stakeholders. Employees and creditors are well provided with contractual guarantees; over time they can renegotiate higher security. Shareholders, in contrast, buy shares minus any contractual guarantees of increasing returns and while they remain shareholders they are 'stuck with their deal'.⁴³⁶ Further, the following protection is provided under the EU Directives: (i) capital maintenance policies (when in risk of debt default then limiting a company's control to dispose of their assets); (ii) minimum share capital requirements mandated by law;⁴³⁷ (iii) the obligation of consolidated accounts, when companies transfer assets to the disadvantage of the creditors;⁴³⁸ (iv) disclosure obligations (this helps creditors to establish a company's credibility);⁴³⁹ and (v) protecting the creditors when two companies form a merger as the initial debtors are lost.⁴⁴⁰

Management policies to protect creditors are underdeveloped in any corporate governance system, as their interests are well safeguarded at a general level by the board's obligation to further the company's interests, short of liquidation.⁴⁴¹

4.6 The influence of blockholding in German corporate governance model

Blockholders are dominant across companies worldwide and can be simply defined as any shareholder who owns at least 5% of a company's common stock.⁴⁴² In

⁴³⁶ A Dignam and J Lowry, *Company Law* (6th edn, Oxford University Press 2010) 385-386.

⁴³⁷ Second Council Directive 1977/91/EEC of 13 December 1976 on coordination of safeguards, which for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent throughout the Community [1977] OJ L26/1: this is no longer in force.

⁴³⁸ Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts [1983] OJ L193: this is no longer in force.

⁴³⁹ Council Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent [2009] OJ L258/11: this is no longer in force.

⁴⁴⁰ Article 13 of the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies [1978] OJ L295.

⁴⁴¹ 'The Board of Directors: Composition, Structure, Duties and Powers' (*Organisation for Economic Co-operation and Development*, 2000) <<http://www.oecd.org/dataoecd/21/30/1857291.pdf>> accessed 10 October 2015.

⁴⁴² A Edmans, 'Blockholders and Corporate Governance' (2014) 6 *The Annual Review of Financial Economics* 24.

Germany, blockholding is also a mechanism for mitigating agency costs between the management and the shareholders. The corporate governance system is established on 'block', in contrast with shared ownership. In stock-market-based economies, external block shareholders are regarded as monitors of the management board; this is more prevalent in governance systems like Germany in comparison with the UK or the Anglo-American model of governance.⁴⁴³ Blockholding principally involves the banks, such that several companies cultivate a main bank relationship.⁴⁴⁴ Clarke notes that 18/20 German companies which have stock market capitalisation over \$500 million have blockholders owning more than 20% of the stock.⁴⁴⁵ Scholars have yet to establish whether the calculated advantages and costs of large blocks held by various shareholders are detrimental or beneficial to German companies.⁴⁴⁶ Some have suggested that blockholdings a vital indicator of an insider-based or closed financial market.

Blockholding and codetermination are historically related. Codetermination was a 'social and political reaction to blockholding'.⁴⁴⁷ Codetermination establishes a balance of power on a supervisory board by delegating half the seats to employee representatives, thus limiting the influence of blockholding.

4.7 Works Councils: An alternative to trade unions

Employee representation in the private sector of German corporate governance through elected works councils began in 1950s and now is very common in German private companies. Employee representation rights are not only 'exercised in national works council organisations, but in more than 1,000 European Works councils that represent more than 18 million employees'.⁴⁴⁸ This representation was mainly found at the establishment level, as trade unions were predominantly active

⁴⁴³ A Shleifer and RV Vishny, 'A Survey of Corporate Finance' (1997) 52 (2) *Journal of Finance* 737-783.

⁴⁴⁴ AD Clarke, 'German Corporate Governance Provision For Employees: Lessons For Australia?' (2006) 10 *Southern Cross University Law Review* 21.

⁴⁴⁵ Ibid.

⁴⁴⁶ E Boehmer, 'Who Controls German Corporations?' in McCahery and others (eds), *Corporate Governance Regimes: Convergence and Diversity* (2002) 268, 272.

⁴⁴⁷ MJ Roe, 'Political Determinants of Corporate Governance: Political Context, Corporate Impact' (2003) Harvard Law and Economics Discussion Paper No. 451
<http://lsr.nellco.org/harvard_olin/451> accessed 12 October 2015.

⁴⁴⁸ Sick et al., 'Workers' Participation in Europe' (*Hans Boeckler Foundation*, August 2014)
<http://www.boeckler.de/pdf/p_mbf_report_aug_e_2014.pdf> accessed 23 October 2015.

at industry level.⁴⁴⁹ Works councils deal with matters that directly affect the employees and do not represent directors' or employers' interests.⁴⁵⁰ Private sector companies with five employees or more are legally required to set up a works council.⁴⁵¹ The election procedure for works councils, its composition and rules are governed by law. The Works Council Constitution Act 1972 provides the works council's roles, and guarantees that they are now a crucial part of the German industrial relations landscape.⁴⁵² A works council's objective is to function in a way that is beneficial for both the management and the employees; it is required to work in a spirit of mutual trust with management.⁴⁵³

Works councils have rights of information, codetermination and participation bestowed upon them by law. The type of issue in question establishes the strength of these rights.⁴⁵⁴ Gaugler and Wiltz identify three key areas where works councils have the right to make submissions:⁴⁵⁵ (i) development and training measures; (ii) making and implementation of employment planning; and (iii) vocational training.

Companies that ignore the works council's rights can be legally forbidden by an injunction from putting their business decisions into effect. Works councils have a legal right to information concerning:⁴⁵⁶ (i) the appointment of executives; (ii) the

⁴⁴⁹ van den Berg et al., 'The impact of representative employee participation on organisational performance- A comparison of four neighbouring countries- Belgium, Germany, the Netherlands and the United Kingdom' (2011) University of Antwerp Working Paper D/2011/1169/019 ACED/2011/013: <http://www.ilpc.org.uk/Portals/56/ilpc2012-paperupload/ILPC2012paper-ACED%20working%20paper%20Van%20den%20Berg%20et%20al%202011_20120314_025217.pdf> accessed 30 October 2015.

⁴⁵⁰ W Müller-Jentsch, 'Germany: From Collective Voice to Co-management' in J Rogers and W Streeck (eds), *Works Councils: Consultations, Representation, and Cooperation in Industrial Relations* (University of Chicago Press 1995) 56.

⁴⁵¹ M Hall and J Purcell, 'Information and Consultation Practice across Europe Five Years after the EU Directive' (*European Foundation for the Improvement of Living and Working Conditions*, 2011) <http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1097en.pdf> accessed 13 October 2015.

⁴⁵² W Müller-Jentsch, 'Germany: From Collective Voice to Co-management' in J Rogers and W Streeck (eds), *Works Councils: Consultations, Representation, and Cooperation in Industrial Relations* (University of Chicago Press 1995) 56.

⁴⁵³ Section 2(1) of the Works Council Constitution Act 1972.

⁴⁵⁴ Duffy et al., 'Working Together- A Vision for Industrial Democracy in a Common Weal Economy' (*Jimmy Reid Foundation*, 2013) <<http://reidfoundation.org/wp-content/uploads/2013/12/IndustrialDemocracy.pdf>> accessed 23 October 2015.

⁴⁵⁵ E Gaugler and S Wiltz, 'Germany' in C Brewster and others (eds), *Euro-Dean Guide to Human Resource Management* (Academic Press 1992) 163-228.

⁴⁵⁶ L Holden, 'Chapter 13: Employee involvement and empowerment', in I Beardswell and L Holden (eds), *Human Resource Management: A Contemporary Approach* (4th edn, Pearson Education Limited 2001) 584.

working environment; (iii) health and safety; (iv) work organisation; and (v) organisational changes that could potentially be detrimental to the employees.

Furthermore, works councils have participation rights on the following matters:⁴⁵⁷ (i) veto rights on specific employee movements; (ii) information rights on financial matters and changes; and (iii) codetermination rights on social and employees' matters.

Works councils have codetermination rights on any resolutions concerning:⁴⁵⁸ (i) the company pension; (ii) profit-sharing; (iii) saving schemes; (iv) working hours; (v) vacations; (vi) job evaluation and appraisals; (vii) hiring, promotion and dismissal policies; (viii) grievance handling; (ix) training; (x) conduct of employees; and (xi) any employment terms that do not include industrial agreement between the employers' association and the relevant unions.

In the event of a disagreement, works councils must negotiate with the management.⁴⁵⁹ If an agreement cannot be reached, the law requires the negotiations have a waiting period of a month after which the management can implement its decision. Unlike trade unions which strike to pressurise the management to meet their objectives, works councils must take unresolved conflicts to courts. This ensures that conflicts are resolved in a fashion that does not disregard the company's interests, in the way that a trade union strike does.⁴⁶⁰

It is interesting that information, participation and codetermination rights can be considered by the management but it is not mandatory for them to make it

⁴⁵⁷ AD Clarke, 'German Corporate Governance Provision For Employees: Lessons For Australia?' (2006) 10 Southern Cross University Law Review 29.

⁴⁵⁸ C Lahovary, 'Chapter 2- Employee Representation, Codetermination, And Business Performance' (ESRC Centre for Business Research, University of Cambridge) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.9577&rep=rep1&type=pdf>> accessed 14 August 2015.

⁴⁵⁹ Section 74 of the Works Council Constitution Act 1972.

⁴⁶⁰ van den Berg et al., 'The impact of representative employee participation on organisational performance- A comparison of four neighbouring countries- Belgium, Germany, the Netherlands and the United Kingdom' (2011) University of Antwerp Working Paper D/2011/1169/019 ACED/2011/013 <http://www.ilpc.org.uk/Portals/56/ilpc2012-paperupload/ILPC2012paper-ACED%20working%20paper%20Van%20den%20Berg%20et%20al%202011_20120314_025217.pdf> accessed 30 October 2015.

applicable.⁴⁶¹ Many of the information, participation and codetermination rights are repetitive and these rights do not allow employee representatives to make absolute business decisions; these rights are retained by the management exclusively.⁴⁶²

However, if mutual cooperation exists between management and works council, then the works council may function as a valuable connection and resolve perilous situations before they worsen, thus exhibiting a collectivist and centralising tendency.⁴⁶³ Works councils may also accomplish systematic working terms and standards in operations.⁴⁶⁴ On the other hand, the rights provided under works councils can 'generate complications too in management's daily business operations, managerial questions and other sectors which demand cooperation'.⁴⁶⁵

After the financial crisis of 2008, works councils must now be consulted on the company's investors' objectives and notify them of the effect of any potential takeovers.⁴⁶⁶ Additionally, trade unions have attempted to connect state employment programmes into works councils to minimise job losses; an employee who loses their job can secure employment elsewhere in the company by 'specially aimed training measures'.⁴⁶⁷

The significance of learning from German works councils is that they represent employees' interests effectively at an establishment level, as trade unions are more functional at an industry level. It seems obvious that the adoption of the EWC Directive was based on the success of works councils in Germany.

⁴⁶¹ L Holden, 'Chapter 13: Employee involvement and empowerment', in I Beardswell and L Holden (eds), *Human Resource Management: A Contemporary Approach* (4th edn, Pearson Education Limited 2001) 584.

⁴⁶² 'The European Company Statute' (White and Case, 2001) <<http://www.whitecase.com/publications>> accessed 17 July 2015.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

⁴⁶⁶ Duffy et al., 'Working Together- A Vision for Industrial Democracy in a Common Weal Economy' (Jimmy Reid Foundation, 2013) <<http://reidfoundation.org/wp-content/uploads/2013/12/IndustrialDemocracy.pdf>> accessed 23 October 2015.

⁴⁶⁷ Ibid.

4.8 Management accountability

One of the foremost advantages of the German corporate governance is management accountability. This is because German banks can hold 'enormous blocks of stock and accordingly delegate their representatives on the governing board, who can influence corporate decision-making'.⁴⁶⁸ An enduring relationship is developed between the management and the bank representatives; and the management takes a view that bank representatives have the company's best interest in mind to have a long-term relationship and expect profits. This is contrary to the view that shareholders have 'little loyalty' to the company like 'an anonymous monolith'.⁴⁶⁹

4.9 Enhanced auditing systems

Inadequacy of systematic dialogue between the internal auditors, the audit committee and the external auditors⁴⁷⁰ is an example of a flawed or ineffective auditing system and can be a substantial cause for a company's downfall. Cioffi correctly notes on the general issue of a flawed auditing system:

*"Management controlled the auditing and disclosure of firm finances. The imbalance of power between supervisory and management boards was so great that managers engaged in a fairly common practice of providing supervisory board members with the auditor's report on the corporation's finances at the meeting in which they were to approve it ± and then collecting the report at the end of the meeting, ostensibly to preserve the confidentiality of the information it contained. This practice effectively kept the firm's finances confidential from the supervisory board as well and resulted in the rubber-stamping of the accounts."*⁴⁷¹

Enron's failure in the U.S. revealed that there were conflicts of interest involved in its corporate auditing.⁴⁷² This led to the enactment of the Sarbanes-Oxley Act in the

⁴⁶⁸ ES Adams, 'Corporate Governance After Enron and Global Crossing: Comparative Lessons for Cross-National Improvement' (2003) 78 (2) Indiana Law Journal 723-781.

⁴⁶⁹ Ibid.

⁴⁷⁰ For example, a statutory auditor.

⁴⁷¹ JW Cioffi, 'Restructuring "Germany Inc.": The Politics of Company and Takeover Law Reform in Germany and the European Union' (2002) 24 (4) Law & Policy 358-362.

⁴⁷² J Seligman, 'No One Can Serve Two Masters: Corporate & Securities Law After Enron' (2002) 80 Washington University Law Quarterly 449, 453-54.

U.S. to minimise any such future conflicts. The Sarbanes-Oxley Act focused on safeguarding investors by enhancing the accuracy and dependability of company disclosures made per the securities laws.⁴⁷³ Similarly, the UK corporate governance system may be currently flawed in that the rules allow a management board to appoint and dismiss their auditors, thereby creating a potential for interest conflicts.⁴⁷⁴

Assuring systematic dialogue between the internal auditors, the audit committee and the external auditors ensures the absence of loopholes in substantiation of revenues, assets, expenses and liabilities, risk monitoring and compliance coverage in its entirety.⁴⁷⁵ Germany's corporate governance serves as an example of such a systematic communication and the dualistic board structure in Germany allows the supervisory board to balance and control corporate management. For instance, section 5.3.3 of the German Corporate Governance Code (Deutscher Corporate Governance Kodex) requires that:

*“The Supervisory Board shall set up an Audit Committee which, in particular, handles the monitoring of the accounting process, the effectiveness of the internal control system, risk management system and internal audit system, the audit of the Annual Financial Statements, here in particular the independence of the auditor, the services rendered additionally by the auditor, the issuing of the audit mandate to the auditor, the determination of auditing focal points and the fee agreement, and - unless another committee is entrusted therewith - compliance.”*⁴⁷⁶

⁴⁷³ T Glaub, 'Lessons from Germany: Improving on the U.S. Model for Corporate Governance' (2009) 5 (2) International Law & Management Review 239.

⁴⁷⁴ KJ Hopt and PC Leyens, 'Board Models in Europe: Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy' (2004) European Corporate Governance Institute Working Paper No. 18 <<http://ssrn.C<lln/abstract=487944>> accessed 10 October 2015.

⁴⁷⁵ 'Long-Form Audit Report in Germany: Audit Regulatory Committee' (Federal Ministry of Justice, 3 March 2011) <http://ec.europa.eu/internal_market/auditing/docs/committees/pres1-03-03-11_en.pdf> 10 October 2015.

⁴⁷⁶ 'German Corporate Governance Code' (Regierungskommission Deutscher Corporate Governance Kodex) <http://www.ecgi.org/codes/documents/cg_code_germany_24jun2014_en.pdf> accessed 10 October 2015.

The management board is required to prepare the consolidated financial statements, which are subsequently examined by the auditors and the supervisory board.⁴⁷⁷ The auditors also participate in the supervisory board's discussions on the consolidated financial statements, annual financial statements and reports on the essential results of their audit.⁴⁷⁸ Further, the law requires that the external auditors must provide the supervisory board with a 'long-form report'.⁴⁷⁹ In comparison with a general auditor's report, a long-form report comprehensively recapitulates the audit's significant findings on the associated monitoring systems and going concern assumption, irregularities encountered, 'window dressing' dealings, material disclosures, application of accounting methods, and future developments and risks facing the company.⁴⁸⁰

Therefore, the German corporate governance system can be considered much more effective because the dualistic board structure provides that the audit is 'completely and exclusively' dealt with by the supervisory board.⁴⁸¹ This aspect allows: (i) direct submission of the audit reports to the supervisory board; (ii) confidentiality of the auditors' report; and (iii) the auditors' participation in annual accounts approval meetings.

4.10 Conclusion

There is an ambiguity to ascertain whether there is a strong connection between a company's economic success and employee involvement. This has been confirmed in various study conclusions in *Section 4.4 Codetermination: An ideal corporate governance feature of the EU*, *Table 4- Detrimental effect of employee involvement*⁴⁸² and *Table 5- Neutral effect of employee involvement*⁴⁸³. Also, the simple fact that all these studies have been conducted in different economic climates in the past few decades have yielded different conclusions.

⁴⁷⁷ Section 7.1.2 of the German Corporate Governance Code (Deutscher Corporate Governance Kodex).

⁴⁷⁸ Section 7.2.4 of the German Corporate Governance Code (Deutscher Corporate Governance Kodex).

⁴⁷⁹ § 321-322 of the German Commercial Code (Handelsgesetzbuch: HGB) and § 170 para. 3 and § 171 para. 1 of the Stock Corporation Act 1965 (Aktiengesetz: AktG).

⁴⁸⁰ § 321 of the German Commercial Code (Handelsgesetzbuch: HGB).

⁴⁸¹ T Glaub, 'Lessons from Germany: Improving on the U.S. Model for Corporate Governance' (2009) 5 (2) International Law & Management Review 239-240.

⁴⁸² See, *Chapter 2- Justifying Employee Involvement in Corporate Governance*.

⁴⁸³ Ibid.

Nonetheless, this chapter has demonstrated the strengths of the German model of corporate governance, especially the dualistic board structure and board-level employee representation which subsequently results in increasing the company's efficiency and its market value. This is in concurrence with the findings in previous *Table 3- Advantageous effect of employee involvement*⁴⁸⁴ and the absence of any serious attempts to revise the German codetermination laws. The German model case study provides that board-level employee representation facilitates a dependable channel of information flow, thereby improving the decision-making process. Involving employees' in the preliminary stages of decision-making on significant matters helps limit criticism and encourages acceptance within the workforce, as it is arguable that executive board directors cannot assimilate all pertinent information that is required to execute decision-making on significant matters. The German model is coherently structured in comparison with other contemporary and complex economic models where the information flow is extensively dispersed.

The discussions in this chapter also evidences that Germany is one Member State that has positively established the corporate board's function in reducing agency costs and maximising firm value since the 2008 financial crisis. The key German company law mechanisms,⁴⁸⁵ disclosure requirements, blockholding, financial accounting system along with the governances and regulatory strategies for protecting principals (see, *Table 9- Governance strategies for principal's protection* and *Table 10- Regulatory strategies for principal's protection*) successfully deal with the agency problems between: (i) the shareholders and the management; and (ii) the majority shareholders and the minority shareholders. This collectively provides an ideal framework for the EU to effectively mitigate agency conflicts by increasing productivity and encouraging the normative goal of cumulative social welfare.

Other positive discussed aspects were the German works councils which is mirrored in the EWC Directive and serves as the works councils model for the entire EU and the German audit system which eliminates possibility of any conflict of interest due to

⁴⁸⁴ Ibid.

⁴⁸⁵ German Corporate Governance Code, the German Stock Corporation Act 1965, the Civil Code of Germany and the Codetermination Act 1976.

its independent nature. This is vital in producing a true representation of a company's performance.

In the context of an SE, this chapter reiterates, at least moderately, the observation of the trend that an SE is relatively successful in Member States with dualistic board structure. The number of registered SEs in Member States which have dualistic board structure is higher than the number of SEs in Member States which have monistic board structure. This is consistent with the *Figure 3- Monistic and dualistic board structure map of EU* in *Section 4.3 Dualistic board structure* discussed above. For example, Germany, Czech Republic, Slovakia, Austria, Netherlands and France have dualistic board structure and the highest number of registered SEs in comparison with other Member States.⁴⁸⁶ This indicates that monistic board structure is unsuitable to employee involvement and is best suited to the Anglo-American model or family-run industries. The German model of corporate governance which emphasises collaboration between the employees and management distributes resources more proficiently than the Anglo-American model. Further, the supervisory board in the German model is well equipped to monitor corporate management.

The objective to identify an ideal corporate governance structure that will serve as a model to the EU company law has been evaluated in this chapter. The legal embodiment of the above discussed features in Germany's company law has led to codetermination being considered as a positive factor for a company's success by most German national and multinational companies.⁴⁸⁷ *Table 8- Survey on co-determination* provides one such example to support this notion that there is significant support for codetermination at board-level.

⁴⁸⁶ 'SE Companies: Facts and Figures 2017' (SEEurope, March 2017) <<http://www.worker-participation.eu/European-Company-SE/Facts-Figures>> accessed 11 February 2018

⁴⁸⁷ See, *Section 4.4 Codetermination: An ideal corporate governance feature of the EU*.

CHAPTER 5- LAISSEZ-FAIRE APPROACH TOWARDS EMPLOYEE INVOLVEMENT IN THE UK

5.1 Introduction

The aftermath of the 2008 financial crisis differed substantially in two of the most powerful economies in Europe. Germany was more resilient during and after the financial crisis and continues to prosper; the UK, in contrast, has endured a longer period of the financial crisis. Some authors go as far as to claim that Germany ‘came roaring out of recession with higher growth’ and the financial crisis was more of a vindication for its economy.⁴⁸⁸ German corporations continued to remain global industrial leaders – for example. BASF and Volkswagen (despite its global emissions scandal); in the UK, car⁴⁸⁹ and chemical companies⁴⁹⁰ collapsed.⁴⁹¹

This chapter analyses the overall approach to employee involvement in the UK and will take a critical view of the shareholder value concept prevalent in the UK’s corporate governance culture. The chapter will seek to establish answers to the following questions.

- (i) Does domestic company law adequately deal with employees’ interests?
- (ii) What are the driving factors for the lack of board-level employee representation in the UK?
- (iii) Have trade unions outlived their purpose?
- (iv) What corporate governance arguments work in the interest of employees?
- (v) What are the shortcomings of British codetermination and how can ECS fill the gap to augment a functional and beneficial codetermination in the UK?

Employee participation has developed little in the UK since the 1980s, when the Conservative government rigidly opposed all forms of employee participation.⁴⁹² The

⁴⁸⁸ L Hildyard, ‘German lessons: Co-determination and employees on Boards’ (*IPA*, October 2013) <<http://www.ipa-involve.com/news/german-lessons>> accessed 19 January 2016.

⁴⁸⁹ MG Rover.

⁴⁹⁰ Imperial Chemical Industries PLC.

⁴⁹¹ L Hildyard, ‘German lessons: Co-determination and employees on Boards’ (*IPA*, October 2013) <<http://www.ipa-involve.com/news/german-lessons>> accessed 19 January 2016.

⁴⁹² M Gold, ‘The European Works Council Directive- Changing Rationales of EU Employee Participation’ in M Whittall and others (eds), *Towards a European Labour Identity: The Case of the European Works Council* (Routledge, Oxon 2007) 19-20.

general approach can be characterised as laissez-faire: an approach or policy of letting things take their 'natural' course. It was an 18th century economic theory that signified the absence of government interference in businesses.⁴⁹³ For example, the UK has evolved (or, arguably, has been forced by EU laws) towards the information and consultation aspects of employee involvement, but representation rights for employees at board level remain absent. The ICE Directive has been widely and effectively implemented; in contrast, the ECS remains unpopular. This chapter will discuss the progressive explanations for employee involvement and identify proposals for an amicable way forward.

5.2 History of British codetermination

The irony is that the UK was the first country in the world to undergo an industrial revolution in the 18th century,⁴⁹⁴ and legislated one of the first codetermination laws in the world: The Port of London Act 1908. Section 1(7) of the Port of London Act 1908 stated:

“With a view to providing for the representation of labour on the Port Authority, one of the members of the Port Authority appointed by the Board of Trade shall be appointed by the Board after consultation with such organisations representative of labour as the Board think best qualified to advise them upon the matter, and one of the members of the Port Authority appointed by the London County Council shall be appointed by the council after consultation with such organisations representative of labour as the council think best qualified to advise them upon the matter.”

This law allowed just one appointed employee representative to the Port of London Authority's board of directors for trade union consultations. At present, the UK is one of the Member States in the EU that has no statutory or traditional form of board-level employee representation embedded in its corporate governance system.

⁴⁹³ 'Laissez-faire' (*Oxford Dictionaries*) <<https://en.oxforddictionaries.com/definition/us/laissez-faire>> accessed 19 January 2016.

⁴⁹⁴ E McGaughey, 'Votes at Work in Britain: Shareholder Monopolisation and the 'Single Channel' (2017) Centre for Business Research, University of Cambridge Working Paper 487 <https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp487.pdf> accessed 12 September 2017.

Historically, trade unions were the only means of employee representation in the UK. This is a single channel approach, where the state would refrain from involving itself in matters of industrial relations and the trade unions have a monopoly on employee representation.⁴⁹⁵ Since the 19th century, this dominance of trade unions has remained the defining feature of the UK's industrial relations.⁴⁹⁶ This approach derived from two main assumptions: that a company operates to aggrandise shareholders' value; and that employees and the managerial board cannot work together. These assumptions leave reduced options for the representation of employees at the board level. There is no domestic law that forbids employee representation on company boards, but owing to traditional company models, employee representation has generally only been channelled via this single channel approach. The UK finds itself, therefore, way behind modern developments. This shortcoming became especially evident after the UK joined the EU, which led to amalgamating different notions of corporate governance and industrial relations. This shortcoming is truer now than ever before, when the world has become 'vasudhaiva kutumbakam'.⁴⁹⁷ As communication and globalisation progress, company operatives must work together for mutual benefit. The UK's position of having no statutory requirement of board-level employee representation, and the resolute opposition of British employers' associations to any type of employee involvement, has become contestable.

Early efforts to bring about a change were seen in the Bullock Commission's Report (1977).⁴⁹⁸ This proposed a dual channel of representation, along with other provisions that would have increased employee involvement in UK companies. However, these proposals were never implemented; any prospect of meaningful employee representation was dashed when the Conservative party rose to power in 1979 and the issue was taken off the political agenda.

⁴⁹⁵ C Barnard, 'Worker Representation in the UK' (2005)

<http://www.jil.go.jp/english/events/documents/clls06_05uk.pdf> accessed 15 April 2016.

⁴⁹⁶ J Clark and D Winchester, 'Management and Trade Unions' in K Sisson (ed), *Personnel Management: Comprehensive Guide to theory and Practice in Britain* (Blackwell, Oxford 1994) 714.

⁴⁹⁷ 'Vasudhaiva kutumbakam' is a Sanskrit term used to denote that the whole world is one global village.

⁴⁹⁸ Also referred to as: Industrial Democracy (White Paper, Cmnd 6810, 1978).

McGaughey notes that 'the practice of British codetermination was torn between two competing views: that participation at work should only be channelled through purchase of company shares, or that participation should only be channelled through collective bargaining'.⁴⁹⁹ He further argues that it is not a coherent economic choice for corporations to embrace codetermination in a free market, unless required by law.⁵⁰⁰ This point is highly debatable and he provides no evidence to support it. The only identifiable evidence to partially support this argument is the experiment in codetermination conducted between 1960 and 1970 in several UK corporations, when it was opposed unconditionally by the majority of managers who could not align with the German style of codetermination.⁵⁰¹ In Germany, corporations did not initially embrace the passing of the Iron, Coal and Steel Codetermination Act 1951 and Codetermination Act 1976, but eventually realised its economic and social benefits.

If codetermination is required by law, then any such law needs to be passed after consultation and consent from the majority of companies' representatives and policy makers. The exception to this rule is the imposition of EU law on Member States who do not necessarily embrace it, especially the UK. It is interesting to note that the UK has always been the 'black sheep' when it comes to embracing EU laws, whether it is for immigration, jobs or employee involvement.

Industrial relations in the UK took a substantial step forward with the implementation of the ICE Directive, which requires that companies within the UK inform and consult with employee representatives. The attitude to employee involvement nationally remains laissez-faire. British employers' associations and corporations in general have not embraced the ECS, as forming an SE company is voluntary. This explains why the Department for Business, Innovation and Skills had only one consultation

⁴⁹⁹ E McGaughey, 'British Codetermination and the Churchillian Circle' (2014) UCL LRI WP 2/2014 <<http://www.ucl.ac.uk/laws/lri/papers/2%20-2014%20British%20Codetermination%20and%20the%20Churchillian%20Circle.pdf>> accessed 18 November 2015.

⁵⁰⁰ Ibid.

⁵⁰¹ JP Begin, *Dynamic Human Resource Systems: Cross-National Comparisons* (Walter de Gruyter, Berlin 1997) 136.

paper⁵⁰² before transposing the ECS: the department received no major interest from corporations, professional bodies or the public.

5.3 Assorted and restricted methods of employee involvement in the UK

The UK has various restricted methods of employee involvement. The number of employee representatives in companies across the UK rose considerably during both the World Wars. These representatives were actively involved with management over working conditions, salary negotiations, industrial actions, disciplinary issues and so on. However, the government did not ever attempt to regulate or legislate employee representatives or workplace consultation during the 20th century.

5.3.1 The decline of trade unions in the UK

Employees' interests in the 20th century was conventionally channelled through trade unions in the UK. The Trade Union Act 1871, the Conspiracy and Protection of Property Act 1875 and the Trades Disputes Act 1906 had laid the foundations for unions to be more effective legally. Trade unions had gained considerable strength in 1910 (membership was at 2,565,000)⁵⁰³ and many disputes were settled at sectoral level between employers' associations and unions.⁵⁰⁴ The Conciliation Act 1896 and the Trade Boards Act 1909 encouraged collective bargaining, but the government did not explicitly regulate the negotiations between the unions and employers or legislate any forms of requirement or exclusion for representation. In the following decades, there was a shift from collective bargaining and the dual layers of union association as trade unions developed within the companies the employees were employed to represent their interests.

In addition to the social rationale for having a strong trade union, trade unions have been reported to serve the economic value of the business. A combined study by the London School of Economics and University of Reading, using data from 18 OECD countries, concluded that employees in companies represented by trade unions have

⁵⁰² European Public Limited-Liability Company Regulations 2004, SI 2004/2326.

⁵⁰³ The Department for Business, Innovation & Skills, 'Trade Union Membership 2014' (2015) Statistical Bulletin 5-6.

⁵⁰⁴ HA Clegg, A Fox and AF Thompson, *A History of British Trade Unions since 1889, Vol 1, 1889-1910* (Oxford 1964) 464-465.

19% more productivity than companies which do not.⁵⁰⁵ The study provided positive evidence to support the idea of having a cooperative and functional trade union, although appreciated that productivity is affected by factors like strategic policies and cooperation with the management. Butler⁵⁰⁶ and Heery's⁵⁰⁷ recent research also established that non-union employee representation mechanisms are less effective in terms of productivity for the management, and unions still dominate the representation of employees' interests.

Businesses in continental Europe have usually considered trade unions as social partners concerned with a wider range of subjects and accomplishing a much more substantial representative democratic role, unlike the US, where unions historically are viewed as disturbing economic efficiency and as 'hostile bodies'.⁵⁰⁸

Given that, some decades ago, the unions were the foremost intercessor between employees and employer for matters of all significant concern in the UK, why is there a decline in trade union membership in the UK? The latest statistical data shows 6.8 million employees to be trade union members.⁵⁰⁹ The decline in union membership can be attributed to five main factors.

Firstly, membership numbers decline when unions merge. For example, UNISON (the second largest trade union in the UK) was a result of the merger in 1993 of the Confederation of Health Service Employees (COHSE), the National and Local Government Officers' Association (NALGO) and the National Union of Public Employees (NUPE). Barnard reported in 2005 that some of the major trade unions

⁵⁰⁵ D Asteriou and V Monastiriotis, 'Trade Unionism and Growth: A Panel Data Study' (The University of Reading and London School of Economics joint-study, 2000) <<http://www.reading.ac.uk/Econ/Econ/workingpapers/emdp429.pdf>> accessed 19 March 2016.

⁵⁰⁶ P Butler, 'Non-union employee representation: Exploring the riddle of managerial strategy' (2009) 40 (3) *Industrial Relations Journal* 198-214.

⁵⁰⁷ E Heery, 'Worker representation in a multiform system: A framework for evaluation' (2010) 52 (5) *Journal of Industrial Relations* 543-559.

⁵⁰⁸ 'Employee representation and information, consultation and co-determination rights in Europe' (*Practical Law*, 1 November 2015) <<http://uk.practicallaw.com/9-503-2690>> accessed 14 February 2016.

⁵⁰⁹ 'Annual Report of the Certification Officer 2016-2017' (*Certification Office for Trade Unions and Employers' Associations*, June 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629399/Cert_Off_Ann_Rep_2016-2017.pdf> accessed 19 December 2017.

like Amicus' membership was significantly declining.⁵¹⁰ In 2004-2005, Amicus' membership took a fall of more than 100,000 members. Following her report, in 2007, Amicus was pressured to merge with the Transport and General Workers' Union (TGWU) to form the largest trade union in the UK called Unite.⁵¹¹ Both Unite and UNISON have exaggerated their membership numbers on their websites; they stress the importance of joining and make the cancellation of membership arduous. Furthermore, to induce jobless members to remain in the union, tactics such as offering designer sunglasses, pre-paid debit cards with cashback offers and free advice on claiming state benefits are now being employed.⁵¹² For at least the past three years UNISON has stated on its website that it is "serving more than 1.3 million members".⁵¹³ In fact, according to the Certification Officer (Department for Business, Innovation & Skills), UNISON's membership was 1,317,500 in 2011, 1,301,500 in 2012, 1,282,500 in 2013 and 1,270,248 in 2014.⁵¹⁴

Secondly, employment has steadily fallen in manufacturing and the construction industries.⁵¹⁵ For instance, the decline in the steel industry in the UK is directly related to a fall in employment. During the 1870s, the UK was the leading manufacturer in metal production, accounting for 40% of the world's steel.⁵¹⁶ The decline in the British steel industry was due first to British Steel's privatisation in 1980s, when the Conservative government refused to subsidise plants running at a loss, and secondly to the growth of cheap imports of Chinese steel, which are marketed at 'unrealistically low prices' in the UK.⁵¹⁷

⁵¹⁰ C Barnard, 'Worker Representation in the UK' (2005)

<http://www.jil.go.jp/english/events/documents/cils06_05.pdf> accessed 15 April 2016.

⁵¹¹ Unite's members come from 20 different public, voluntary and private sectors and the current membership is reported at about 1.42 million.

⁵¹² G Owen, 'The no-trade union: Unite charges jobless £26 a year to fight for their rights... but at least they get a free voucher for designer classes' *Daily Mail* (14 October 2012)

<<http://www.dailymail.co.uk/news/article-2217433/The-trade-union-Unite-charges-jobless-26-year-fight-rights-free-voucher-designer-classes.html>> accessed 1 May 2016.

⁵¹³ 'UNISON' (UNISON, 2016) <<https://www.unison.org.uk/about/>> accessed 1 May 2016.

⁵¹⁴ 'UNISON: The Public Service Union: Annual Returns (Corporate Report)' (*Certification Officer*, 2014) <<https://www.gov.uk/government/publications/unison-the-public-service-union-annual-returns>> accessed 19 April 2016.

⁵¹⁵ C Barnard, 'Worker Representation in the UK' (2005)

<http://www.jil.go.jp/english/events/documents/cils06_05.pdf> accessed 15 April 2016.

⁵¹⁶ A Critchlow, 'China's dumped steel leaves industry facing fight for survival' *the Telegraph* (20 September 2015) <<http://www.telegraph.co.uk/finance/commodities/11878679/Chinas-dumped-steel-leaves-UK-industry-facing-fight-for-survival.html>> accessed 3 May 2016.

⁵¹⁷ Ibid.

Thirdly, unfavourable judicial decisions clearly demonstrated a general hostility towards trade unions. Unions had no recourse to legal means to defend themselves.⁵¹⁸ In *Associated Newspapers v Wilson*⁵¹⁹, the House of Lords ruled that being an active trade union member⁵²⁰ did not imply that members could seek their affiliated union's assistance to negotiate with their employer,⁵²¹ but merely meant that the member could hold a trade union card. The issue in the case was that "the employer decided to offer higher pay increases to employees who agreed to accept personal contracts in place of collectively agreed terms and conditions of employment. Employees who refused to do so, and consequently did not receive the increase, claimed that the employer had taken action short of dismissal against the employees on grounds of their union membership contrary to what is now s.146 Trade Union and Labour Relations (Consolidation) Act 1992".⁵²² This ruling set a precedent for employers to unfavourably differentiate against employees who were trade union members. The ruling was met with wide opposition and there were proposals to overturn it;⁵²³ subsequently, the European Court of Human Rights overturned the ruling and severely criticised it as contravening Article 11 of the European Convention on Human Rights.

Fourthly, exposures to international competition and increasing market pressures in the public sector have reduced the influence of unions.

Lastly, it has been widely suggested that the Conservative government was directly responsible for the decline of unions from 1979. Barnard argues that the Conservative government was hugely influenced by Hayek's work⁵²⁴, which concluded that unions were a considerable obstacle to the market's free operation.⁵²⁵ Conservative legislation sought to minimise the operation of employees'

⁵¹⁸ C Barnard, 'Worker Representation in the UK' (2005)
<http://www.jil.go.jp/english/events/documents/clls06_05.pdf> accessed 15 April 2016.

⁵¹⁹ [1995] IRLR 258.

⁵²⁰ Section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992; and ss.46-48 of the Trade Union and Labour Relations (Consolidation) Act 1992.

⁵²¹ K Ewing, 'The Implications of *Wilson and Palmer*' (2003) 32 Industrial Law Journal 1.

⁵²² C Barnard, 'Worker Representation in the UK' (2005)
<http://www.jil.go.jp/english/events/documents/clls06_05.pdf> accessed 15 April 2016.

⁵²³ Board of Trade, *Fairness at Work* (White Paper, Cm 3968, 1998), para 4.25.

⁵²⁴ FA Hayek, *The Constitution of Liberty* (The University of Chicago Press 1978).

⁵²⁵ C Barnard, 'Worker Representation in the UK' (2005)
<http://www.jil.go.jp/english/events/documents/clls06_05.pdf> accessed 15 April 2016.

representative organisations (for example, the Trade Union and Labour Relations (Consolidation) Act 1992). The government demonstrated its aggressive policy towards trade unions further by downgrading and shutting representative institutions. The Manpower Services Commission⁵²⁶ and National Economic Development Council⁵²⁷ were both shut down (the latter, because it had Trade Union Congress (TUC) members). The functioning of Advisory, Conciliation and Arbitration Service (ACAS) were altered to remove the prerequisite of extending and reforming collective bargaining.⁵²⁸ The Conservative government also pulled back from supporting collective bargaining in the public sector.⁵²⁹

The following graph displays trade union membership in the UK from 1892 to 2014, which shows that trade union membership has continued to fall after the Conservative party's victory of 1979, by about 4.8 million members since 1979.



Figure 4- Trade union membership in the UK (1892 – 2014)⁵³⁰

⁵²⁶ Shut down in 1989.

⁵²⁷ Shut down in 1992.

⁵²⁸ See, s.209 Trade Union and Labour Relations (Consolidation) Act 1992.

⁵²⁹ C Barnard, 'Worker Representation in the UK' (2005)

<http://www.jil.go.jp/english/events/documents/cils06_05uk.pdf> accessed 15 April 2016.

⁵³⁰ The Department for Business, Innovation & Skills, 'Trade Union Membership 2014' (2015) Statistical Bulletin 5-6.

The influence of trade unions may continue to decline as a result of the Trade Union Act 2016. This has been labelled as the ‘biggest crackdown on trade unions for 30 years launched by Conservatives’.⁵³¹ This legislation aims to raise the minimum turnout necessary in ballots to sanction industrial action to 50%, and it would be required by 40% eligible voters to sanction public sector strikes.⁵³² Furthermore, the strike notice is to be increased from 7 days to 14 days; employers may use agency workers to replace workers who are on strike; and unions may be fined if an official armband is not worn by pickets.⁵³³

Notable academics like Barnard,⁵³⁴ Wright,⁵³⁵ Edwards et al.⁵³⁶ and Briône and Nicholson⁵³⁷ have concluded that trade unions will continue to decline in membership and power.⁵³⁸ The hypothesis is that unions will gradually fail completely in the next thirty years. Brown and Marsden have been widely quoted on UK employers’ attitude on unions:

*“firm by firm and sector by sector, employers have responded to tougher competition by tightening controls over work, and either refusing to deal with trade unions at all or doing so only on the basis that their role is one of passive consultation or of positive contribution to improved productivity”.*⁵³⁹

⁵³¹ P Wintour, ‘Biggest crackdown on trade unions for 30 years launched by Conservatives’ *the guardian* (15 July 2015) <<http://www.theguardian.com/politics/2015/jul/15/trade-unions-conservative-offensive-decades-strikes-labour>> accessed 1 March 2016.

⁵³² ‘Employee representation and information, consultation and co-determination rights in Europe’ (*Practical Law*, 1 November 2015) <<http://uk.practicallaw.com/9-503-2690>> accessed 14 February 2016.

⁵³³ Ibid.

⁵³⁴ C Barnard, ‘Worker Representation in the UK’ (2005) <http://www.jil.go.jp/english/events/documents/clls06_05.pdf> accessed 15 April 2016.

⁵³⁵ CF Wright, ‘What role for trade unions in future workplace relations?’ (*acas*, September 2011) <http://www.acas.org.uk/media/pdf/g/m/What_role_for_trade_unions_in_future_workplace_relations.pdf> accessed 15 April 2016.

⁵³⁶ Edwards et al., ‘Great Britain: From Partial Collectivism to Neo-liberalism to Where?’ in A Ferner and R Hyman (eds), *Changing Industrial Relations in Europe* (Oxford: Blackwell, 1998) 27.

⁵³⁷ P Briône and C Nicholson, ‘Employee Empowerment- Towards Greater Workplace Democracy’ (2012) *CentreForum* 42-46.

⁵³⁸ Brown et al., ‘The Individualisation of Employment Contracts in Britain’ (*Department of Trade and Industry Employment Relations*, 1998), <<https://www.bl.uk/collection-items/individualisation-of-employment-contracts-in-britain>> accessed 22 April 2016

⁵³⁹ W Brown and D Marsden, ‘Individualisation and growing diversity of employment relationships’ (2010) *Centre for Economic Performance, The London School of Economics and Political Science CEP Discussion Paper No. 1037* <<http://cep.lse.ac.uk/pubs/download/dp1037.pdf>> accessed 29 January 2016.

This long-lasting decline in trade union influence may have led to the introduction of the notion of board-level employee involvement in many companies in the UK. The number of companies which preferred to service non-union employee involvement mechanisms increased from 16% in 1984 to 46% in 2004 and companies which preferred union representation declined from 24% in 1984 to 5% in 2004.⁵⁴⁰ The statistics are a decade old, but indicate the shifting trend away from union representation. This trend has been described by Brown et al. as a shift away from collective mechanisms for negotiation between employees and employers towards 'procedural individualisation'.⁵⁴¹ In the future, a corporation's owners may be more receptive to resolving matters in the boardroom than to be challenged by the demands of trade unions. This will be in accordance with 'property rights objections', but at the same time, will pave a way for employee representatives to be part of the management and supervisory board.

5.3.2 ICE Regulations or 'do as you like Regulations'?

Following the establishment of the ICE Directive, the UK legislated The Information and Consultation of Employees Regulations 2004 (hereafter, referred to as the "ICE Regulations"),⁵⁴² which came into force in 2005. This was at the time considered a big step towards greater workplace democracy and employee involvement in the UK.

A statutory framework was established that obligated employers to inform and consult their employees on certain areas of business, restructuring issues and employment. There had never been a law or policy in the UK dealing with information and consultation; most information and consultation provisions emanated from EU laws and regulation, beginning with the Directive on collective redundancies in 1975.⁵⁴³

⁵⁴⁰ CF Wright, 'What role for trade unions in future workplace relations?' (acas, September 2011) <http://www.acas.org.uk/media/pdf/g/m/What_role_for_trade_unions_in_future_workplace_relations.pdf> accessed 15 April 2016.

⁵⁴¹ Brown et al., 'The Effects of British Industrial Relations Legislation 1979-1997' (1997) National Institute of Economic Review 69.

⁵⁴² The Information and Consultation of Employees Regulations 2004, SI 2004/3426

⁵⁴³ M Hall, 'EU Regulation and the UK Employee Consultation Framework' (LSE Workshop on Economic Democracy, London, May 2008) 2.

The ICE Regulations apply to businesses with 50 or more employees. These employees have the right to ask their employer to make information and consultation arrangements regarding matters that affect the organisation. If the company's management does not initiate such arrangement, then employees are entitled to request this formally, as this provision is not automatically applied and further requires 10% of the workforce's support. If the request is made by less than 40% of the workforce, then the management must take into account that different rules apply for valid pre-existing agreements. The broad drafting of the ICE Regulations means that the matters to be informed and consulted upon can be tailored in the agreement, but by default, these matters relate to contractual relations, job prospects, substantial changes to the company and its economic situation.⁵⁴⁴

The ICE Regulations constituted a break from the previous norm for managing corporate restructuring.⁵⁴⁵ First, they promoted the initiation of employee representation structures in management decision-making.⁵⁴⁶ Secondly, by extending the requirement to inform and consult employees on a variety of matters, the regulation probably advanced the development of a holistic structural approach to human resource management, which theoretically could decrease a company's dependence on redundancies. Thirdly, the regulations give information and consultation rights that are independent of trade union recognition and membership.

It was understood from the communication from the EC on Worker Information and Consultation⁵⁴⁷ that the ICE Directive was aimed at creating a European-level framework on informing and consulting employees by increasing social dialogue. EU legislators felt that previous legislative measures at both domestic and EU level had been inadequate.⁵⁴⁸ They subsequently drafted the ICE Directive very broadly

⁵⁴⁴ 'Employee representation and information, consultation and co-determination rights in Europe' (*Practical Law*, 1 November 2015) <<http://the UK.practicallaw.com/9-503-2690>> accessed 14 February 2016.

⁵⁴⁵ S Deakin and A Koukiadaki, 'Capability Theory, Employee Voice and Corporate Restructuring: Evidence from the UK Case Studies' (2011) Centre for Business Research, University of Cambridge Working Paper No. 429 <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp429.pdf> accessed 18 April 2016.

⁵⁴⁶ Prior to this, the practice was to make ad hoc arrangements for representing employees in restructuring.

⁵⁴⁷ COM (1995) 547.

⁵⁴⁸ H Lamponen, 'The Principle on Employee Protection in a Merger and a Transfer of an Undertaking' (PhD thesis, University of Helsinki 2009).

flexibly, leaving transposition to the discretion of Member States.⁵⁴⁹ They may delegate the employee representatives that are to be informed and consulted, and decide how to facilitate workforce and management to discuss information and consultation arrangements. The ICE Directive encompasses a 'general framework' for information and consultation and is limited by the Treaty to a 'minimum requirements' specification.⁵⁵⁰

The UK has limited the ICE Directive's scope and effect by making use of maximum flexibility regarding its transposition. First, the ICE Regulations do not require employers to inform and consult their employees unless 10% of their employees activate statutory measures.⁵⁵¹ Hall points out that:

*"...the government has pursued a 'minimalist' approach to UK implementation more generally, reflecting sustained pressure from UK companies and employers' organisations against any 'gold-plating' of the ICE Directive's provisions that may impose additional regulation on businesses. In a number of areas, including the default information and consultation requirements and confidentiality provisions, the government has essentially adopted a 'copy-out' approach, reproducing the wording of the ICE Directive in the ICE Regulations".*⁵⁵²

By those who consider the right to information and consultation to be fundamental, the 10% threshold is considered a big obstacle, particularly in companies where there is no trade union presence. The ICE Regulations cover only bureaucratic requirements and the UK has completely failed to detail the contents of information and consultation arrangements.⁵⁵³ Further, no attempt is made to guarantee that pre-existing agreements or negotiated agreements will provide better employment protection and employment conditions.

⁵⁴⁹ For example, Article 4 provides that the 'practical arrangements' are only minimally prescriptive and Article 5 allows Member States to lay down procedural rules so that the employees and management can reach their own information and consultation arrangements.

⁵⁵⁰ M Hall, 'EU Regulation and the UK Employee Consultation Framework' (LSE Workshop on Economic Democracy, London, May 2008) 6-7.

⁵⁵¹ Regulation 7(2), ICE Regulations.

⁵⁵² M Hall, 'EU Regulation and the UK Employee Consultation Framework' (LSE Workshop on Economic Democracy, London, May 2008) 7-9.

⁵⁵³ Save for 'standard provision' in the ICE Regulations.

Secondly, the ICE Regulations do not provide any default involvement rights for trade union representatives. They must compete in election with non-union representatives. The ICE Regulations do not touch upon unions and there is no assurance of any union participation in information and consultation processes. Such matters lie solely with the company's management to negotiate with employee representatives, or regulate alone the drafting of the regulation gives companies the right essentially to do nothing. As a result, trade unions have been less than optimistic that they could use the ICE regulations to their advantage, and the ICE Regulations have had a minimal effect on workplace dialogue.⁵⁵⁴ Gollan quotes Scott⁵⁵⁵ that, in the forthcoming years, the UK will be left without any recognised system of employee representation and "the wide corridors of interpretation and the specific structuring of the directive may leave the UK with the worst of both worlds, neither decent works councils, nor strengthened unions".⁵⁵⁶

It is evident from this analysis that the effect of the ICE Regulation in the UK has been essentially trivial. One might infer that the UK never intended to fully implement the directive's scope and benefits, but instead to adopt a 'do as you like' approach.

5.3.3 *Informal involvement techniques*

Many forward-thinking UK companies have started to implement more informal methods of involving employees. These 'informal techniques' augment employee participation to promote some degree of workplace democracy. One such technique is 'quality circles': these are small groups of employees who meet regularly and discuss company activities that affect them: performance, productivity, quality and so

⁵⁵⁴ CF Wright, 'What role for trade unions in future workplace relations?' (acas, September 2011) <http://www.acas.org.uk/media/pdf/g/m/What_role_for_trade_unions_in_future_workplace_relations.pdf> accessed 15 April 2016.

⁵⁵⁵ R Scott, 'The UK and the Information and consultation Directive Transposition or Transformation?' (BUIRA (London) Information and Consultation Seminar, London, May 2002).

⁵⁵⁶ PJ Gollan, 'Non-Union Employee Representation in the United Kingdom: Management Strategies and Union Responses' (PhD thesis, The London School of Economics and Political Science 2014) 251.

on.⁵⁵⁷ Quality circles usefully resolve small-scale problems and are intended to help a company meet its targets of better flexibility and productivity.⁵⁵⁸

Secondly, managers employ 'team working'. They divide employees into semi-independent teams with autonomous power to manage their workload with a view to increase or enhance productivity; this in turn gives employees a degree of independence and a sense of responsibility.⁵⁵⁹

Thirdly, 'Joint Consultative Committees' (JCC's) are considered a substitute for the works councils found in the rest of Europe. JCCs have fixed-term representatives operating at company level and a formal constitution. JCCs represent employees' interests on employment issues, health and safety, welfare services and facilities, and in some workplaces financial issues and future plans are covered.

Lastly, 'works councils' is a system that has been more effective in other countries in comparison with the UK. Works Councils are not elected by all employees and National Works Council (NWC) can be formed under information and consultation provisions made up of employee and management representatives (per the ICE Regulations). NWC have been considered as an effective tool through which a company's management can inform and consult the employees on job or economic related issues.⁵⁶⁰

5.4 UK corporate governance: Shareholders v stakeholders

It has been long established that, in UK corporate governance, shareholders' interests are given majority consideration. Only residual regard is given to the interest of other stakeholders. In 2005, the Labour government made it abundantly clear that the fundamental goal for company directors was to maximise shareholders' value and dismissed the notion that a company must operate in the collective

⁵⁵⁷ P Bri ne and C Nicholson, 'Employee Empowerment- Towards Greater Workplace Democracy' (2012) CentreForum 30.

⁵⁵⁸ P Boxall and J Gilbert, 'The Management of Managers: A Review and Conceptual Framework' (2007) 9 (2) International Journal of Management Reviews 215.

⁵⁵⁹ P Bri ne and C Nicholson, 'Employee Empowerment- Towards Greater Workplace Democracy' (2012) CentreForum 30.

⁵⁶⁰ 'Employee representation and information, consultation and co-determination rights in Europe' (*Practical Law*, 1 November 2015) <<http://uk.practicallaw.com/9-503-2690>> accessed 14 February 2016.

interests of different stakeholders.⁵⁶¹ This view was later reflected in The Companies Act 2006, which explicitly stated that directors must act exclusively in the company's interest, as a whole, and in doing so:

*"...have regard (amongst other matters) to the interests of the company's employees,⁵⁶² the impact of the company's operations on the community and the environment,⁵⁶³ and ... in certain circumstances, to consider or act in the interests of creditors of the company."*⁵⁶⁴

The theory of maximising 'shareholder value' is flawed and has confused corporate priorities.⁵⁶⁵ Lazonick suggests that shareholder value destroys innovation (the key to economic prosperity) because it fails to understand innovation as an intrinsically uncertain method of accruing and collective learning.⁵⁶⁶ Similarly, pursuing shareholder value results in reduced levels of investment, which eventually means declining labour productivity.⁵⁶⁷ Kay gives examples of UK companies like Imperial Chemical Industries (ICI), and US banks like Bear Stearns and Citicorp, which were destroyed by pursuing shareholder value.⁵⁶⁸ However, proposed changes to deal with the failure of shareholders to monitor company's management have been counter-productive.⁵⁶⁹

Maximising shareholder value has been justified in corporate governance on the basis of two main arguments: shareholders are essentially owners, and therefore

⁵⁶¹ Secretary of State for Trade and Industry, Company Law Reform (White Paper, Cm 6456, 2005), 20.

⁵⁶² Section 172 (1)(b) of the Companies Act 2006.

⁵⁶³ Section 172 (1)(d) of the Companies Act 2006.

⁵⁶⁴ Section 172 (3) of the Companies Act 2006.

⁵⁶⁵ J Kay and A Silberston, 'Corporate Governance' (National Institute Economic Review, 1995) 84-96.

⁵⁶⁶ W Lazonick, 'Innovative enterprise: a prosperous economy needs it, but 'maximising shareholder value' undermines it' (2014) <http://npi.org.uk/files/4114/0481/1913/Beyond_Shareholder_Value.pdf> accessed 12 April 2016.

⁵⁶⁷ A Smithers, 'The change in management behaviour' (2014) <http://npi.org.uk/files/4114/0481/1913/Beyond_Shareholder_Value.pdf> accessed 12 April 2016

⁵⁶⁸ J Kay, 'What became of the stakeholder society?' (2014) <http://npi.org.uk/files/4114/0481/1913/Beyond_Shareholder_Value.pdf> accessed 12 April 2016.

⁵⁶⁹ S Deakin, 'The legal framework governing business firms and its implications for manufacturing scale and performance: the UK experience in international perspective' (Foresight, Government Office for Science, 2013)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277169/ep5-legal-framework-implications-for-manufacturing.pdf> accessed 4 April 2016.

should dictate control (an argument often summarised as ‘property rights objections’);⁵⁷⁰ and shareholders, who invest their capital and bear the maximum risk, should therefore control the operations of the company.

Property rights objections have been discussed earlier in *Chapter 2- Justifying Employee Involvement in Corporate Governance*. In response to the second argument, it is superficial to say that only shareholders bear the maximum risk. Stakeholders – like creditors, employees or taxpayers – also bear risk, in terms of livelihoods, investment, businesses, pensions and so on.⁵⁷¹ It is therefore only fair that stakeholders should be part of the governance that directly affects them.

There has been intense discussion on the benefits of power sharing between stakeholders and shareholders in corporate governance. These discussions revolve around the nature of the company involved and the relationship between company structure and productivity.⁵⁷² Germany, Austria, Sweden and Denmark thrived during crises economic, political and social, because employee involvement – especially employee representation – was prevalent in these Member States.⁵⁷³ It is widely suggested that electing employee representatives to the supervisory board (for example, in an SE or any other company which does not have experience with employee involvement) ‘advances a culture where employee involvement is regarded by companies more as a norm than as an exception in Member States’.⁵⁷⁴ This suggestion is in line with the findings of a study by Ernst and Young, commissioned by the EC (Directorate-General Internal Market).⁵⁷⁵ This study

⁵⁷⁰ JJ McCall, ‘Employee Voice in Corporate Governance: A Defense of Strong Participation Rights’ (2001) 11 (1) *Business Ethics Quarterly* 195-213.

⁵⁷¹ W Lazonick, ‘Innovative enterprise: a prosperous economy needs it, but ‘maximising shareholder value’ undermines it’ (2014) <http://npi.org.uk/files/4114/0481/1913/Beyond_Shareholder_Value.pdf> accessed 16 April 2016.

⁵⁷² F Kubler, ‘A Shifting Paradigm of European Company Law?’ (2005) 11 *Columbia Journal of European Law* 219-240.

⁵⁷³ G Jackson, ‘Contested Boundaries: Ambiguity and Creativity in the Evolution of German Codetermination’ in W Streeck and K Thelen (eds) *Beyond Continuity* (Oxford University Press 2005) 4, 24.

⁵⁷⁴ W Njoya, ‘Employee ownership in the European company: reflexive law, reincorporation and escaping codetermination’ (2010) Centre for Business Research, University of Cambridge Working Paper No. 416 <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp416.pdf> accessed 6 December 2015.

⁵⁷⁵ ‘Synthesis of the Comments on the Consultation Document of the Internal Market and Services Directorate-General on the Results of the Study on the Operation and the Impacts of the Statute for a European Company (SE)’ (*European Commission: Directorate General Internal Market and Services*,

suggests that wider connections exist between ‘employee involvement and the future progression of the company’s general ownership structure and governance’.⁵⁷⁶ Njoya points out those companies with established employee involvement traditions adapt readily by embracing the closely-held shared ownership arrangement that prevails in the EU. But on the counter-side, the causation direction could be quite opposite:

*“it may be the fact that these firms have a closely held structure with blocks of shares and dominant shareholders presenting holdup problems that makes employee involvement necessary.”*⁵⁷⁷

This implies that if a company with employee involvement procures a more disjointed shareholding, then employee involvement would no longer be required, and therefore the company would be reasonably expected to withdraw employee involvement after being made public.⁵⁷⁸

Board-level employee representatives have often been shown to work in partnership with other board members. On many occasions, shareholders and employee representatives have mutually agreed on issues to further a company’s interests, as previously discussed in *Section 2.4.2 Employee involvement, governance and ownership* with reference to Gold’s study which concluded that that employee representatives play an essential role in decision-making, along with shareholders’ representatives.⁵⁷⁹ This has been demonstrated when employee representatives in partnership with shareholder representatives defeated a merger proposal when employees identified the risks of the merger; and employee representatives opposed the outsourcing proposal based on the exchange rates argument (the argument was correctly put and the proposal was dismissed). Employees possess extensive

2010) <http://ec.europa.eu/internal_market/consultations/docs/2010/se/summary_report_en.pdf> accessed 19 December 2015.

⁵⁷⁶ W Njoya, ‘Employee ownership in the European company: reflexive law, reincorporation and escaping codetermination’ (2010) Centre for Business Research, University of Cambridge Working Paper No. 416 <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp416.pdf> accessed 6 December 2015.

⁵⁷⁷ Ibid.

⁵⁷⁸ Ibid.

⁵⁷⁹ M Gold, ‘Taken on Board: An evaluation of the influence of employee board-level representatives in company decision-making across Europe’ (2011) 17 (1) European Journal of Industrial Relations 41-56

knowledge of the everyday workings of a company; consequently, their interests run in conjunction with a company's interests.

UK corporate governance may well be out of date and needs to adopt to the European practice of board-level employee representation, for the benefit of employees, management and the company. Markey et al. suggest that such representation can function effectively in partnership with other forms of involvement, like trade unions and works councils.⁵⁸⁰ But this is easier said than done. Bri  ne and Nicholson identify the difficulties of implementation in the UK.⁵⁸¹ board-level employee representation functions more effectively when the board is dual-structured (an executive board and supervisory board); the UK will have to break free from the single board structure tradition of executives and nonexecutives. UK Company Law presents another difficulty. It states that employees on the board cannot be 'representatives' of employees' interests. As it stands, employees on the board will automatically be bound under s.172, Companies Act 2006 to have a fiduciary duty to '...act exclusively in the company's interest... for the profit of its members (i.e. shareholders) ... and ... in certain circumstances, to consider or act in the interests of other stakeholders (i.e. employees)'.

In the UK, the definition of good corporate governance remains questionable. Some recognise the value of employee representatives;⁵⁸² others see it as merely a way to 'reintroduce investment inefficiency'.⁵⁸³ The closure of TATA Steel in Port Talbot has presented the British steel industry in the UK with a bigger dilemma than ever before by putting 40,000 jobs at risk; more recently, the liquidation of BHS has unarguably brought into question the feasibility of the UK's corporate governance system. The UK has failed to recognise the advantages that codetermination may bring to its corporations and the economy at large.

⁵⁸⁰ Markey et al., 'Worker Directors and Worker Ownership' in 'The Oxford Handbook of Participation in Organisations' (2010) 253.

⁵⁸¹ P Bri  ne and C Nicholson, 'Employee Empowerment- Towards Greater Workplace Democracy' (2012) CentreForum 35.

⁵⁸² This sometimes includes other board members.

⁵⁸³ L Fauvera and ME Fuerst, 'Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards' (2006) 82 Journal of Financial Economics 673-710.

This reiterates the point made earlier that a diverse boardroom with various stakeholder representatives will minimise short-sighted and risky decision-making and this also accords with the survey findings of Levinson's study⁵⁸⁴ (discussed earlier in *Section 2.4.3 Property rights objections*) which found that 69% of company chairpersons considered that employee representatives had a positive impact on the governance of their respective companies, while only 5% held opposing views.

5.5 Corporate Governance Reform in the UK

As one of the latest attempts to give 'employees a greater voice in the boardroom', the government published and pursued a Green Paper consultation on 'Corporate Governance Reform' in the UK.⁵⁸⁵ Theresa May sought in "raising the bar for governance standards" by getting employee representatives on the boardroom, so that the UK can thrive in a global economy after Brexit.⁵⁸⁶

The Green Paper raised the three following questions, the submission of which would most likely strengthen the employee, customer and wider stakeholder voice.⁵⁸⁷

"7. How can the way in which the interests of employees, customers and wider stakeholders are taken into account at board level in large UK companies be strengthened? Are there any existing examples of good practice that you would like to draw to our attention? Which, if any, of the options (or combination of options) described in the Green Paper would you support? Please explain your reasons.

8. Which type of company do you think should be the focus for any steps to strengthen the stakeholder voice? Should there be an employee number or other size threshold?

9. How should reform be taken forward? Should a legislative, code-based or voluntary approach be used to drive change? Please explain your reasons, including any evidence on likely costs and benefits."

⁵⁸⁴ K Levinson, 'Employee representatives on company boards in Sweden' (2001) 32 (3) *Industrial Relations Journal* 264-274.

⁵⁸⁵ Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform* (Green Paper, 2016).

⁵⁸⁶ *Ibid.*

⁵⁸⁷ *Ibid.*

Company law in the UK already preserves the significance of employees and other stakeholders in corporate governance to a certain level (discussed in previous *Section 5.4 UK corporate governance: Shareholders v stakeholders* with reference to s.172 of the Companies Act 2006). Notwithstanding, companies in the UK have been unwilling to consider the interests of employees and other stakeholders at board-level, therefore, these provisions need to be bolstered.

In support of question 7. of the Green Paper, the government set out the following key options for strengthening reform: (i) “create stakeholder advisory panels”;⁵⁸⁸ (ii) “designate existing non-executive directors to ensure that the voices of key interested groups, especially that of employees, is being heard at board level”;⁵⁸⁹ (iii) “appoint individual stakeholder representatives to company boards”,⁵⁹⁰ and (iv) “strengthening reporting requirements related to stakeholder engagement”.⁵⁹¹

Notwithstanding, the writer is of the opinion that this was another laissez-faire approach towards employee involvement in the UK, as it is incomprehensible that the government would seek views to strengthen the employees’ voice at the board level by recommending the above options, especially options (ii) and (iii), and simultaneously firmly stating that:

*“The use of employee representatives on company boards is prevalent in a number of European countries but the corporate governance framework in many of these countries is very different to that of the UK...Companies in the UK, however, operate within a unitary board system where all the directors have the same set of duties, and collective responsibility applies. It is a system that we consider serves the UK well and we do not intend to change it.”*⁵⁹²

⁵⁸⁸ Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform* (Green Paper, 2016) para 2.15 – para 2.18.

⁵⁸⁹ Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform* (Green Paper, 2016) para 2.19 – para 2.25.

⁵⁹⁰ Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform* (Green Paper, 2016) para 2.26 – para 2.29.

⁵⁹¹ Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform* (Green Paper, 2016) para 2.30 – para 2.35.

⁵⁹² Department for Business, Energy and Industrial Strategy, *Corporate Governance Reform* (Green Paper, 2016) para 2.12.

This is attributed to the fact that both the government and influential stakeholder bodies in the UK do not believe that board-level employee representation will be a functional aspect of corporate governance for the UK. There were 240 respondents to the above-mentioned questions in the Green Paper, but there was no agreement on which of the four options would strengthen the employees' voice at the board level, therefore prolonging the uncertainty on this issue. For example, the Institute of Directors is of the opinion that board-level employee representation may be suitable for some companies but legislating such a substantial modification to UK board structures is not required at this time.⁵⁹³ The rationale provided is that the potential advantages of having board-level employee representatives in the UK is questionable, therefore, "there is little point in simply electing a "worker" to the board if they are subsequently cut out of all the strategically important discussions".⁵⁹⁴ On the key option (ii) for strengthening employees' voice, scepticism from the respondents surrounded the notion that a collective board duty for stakeholder engagement could be weakened if a single non-executive director were to be designated to this role (see, para 2.11 of the government response to the Green Paper consultation).⁵⁹⁵ Additionally, there were questions raised on the efficacy of non-executive directors, as they may be unable to 'effectively challenge' the rest of the board since they may be 'isolated on the board'.⁵⁹⁶ On the key option (iv), the majority of the respondents were sceptical to the general idea of having stakeholder representatives on the company boards (see, para 2.17 of the government response to the Green Paper consultation).⁵⁹⁷ The cultural norm of evading the inclusion of employees' voice at the board level in UK companies is further verified by statistics gathered from the annual reports of FTSE 350 companies, as noted by Grant

⁵⁹³ 'Response to the Corporate Governance Reform Green Paper (November 2016)' (*Institute of Directors*, 2017)
 <<https://www.iod.com/Portals/0/PDFs/Campaigns%20and%20Reports/Corporate%20Governance/Corporate-Governance-Green-Paper-Consultation.pdf>> accessed 1 March 2018.

⁵⁹⁴ Ibid.

⁵⁹⁵ 'Corporate Governance Reform: The Government response to the green paper consultation' (*Department for Business, Energy and Industrial Strategy*, August 2017)
 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640470/corporate-governance-reform-government-response.pdf> accessed 8 March 2018.

⁵⁹⁶ Ibid.

⁵⁹⁷ 'Corporate Governance Reform: The Government response to the green paper consultation' (*Department for Business, Energy and Industrial Strategy*, August 2017)
 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640470/corporate-governance-reform-government-response.pdf> accessed 8 March 2018.

Thornton.⁵⁹⁸ Presently, there is only one FTSE 350 company that has a board-level employee representative; two companies have employee representatives that visit a few board meetings and one FTSE 350 company that has a non-executive director with a duty employee engagement.⁵⁹⁹ These numbers and the above discussion strongly suggest that the UK government and stakeholders merely talk about strengthening the employees' voice and that of other stakeholders,⁶⁰⁰ but the reality is that the UK is unwilling to change the laissez-faire trend on employee involvement.

As a result of this Green Paper consultation, the Department for Business, Energy and Industrial Strategy actioned two recommendations in relation to strengthening the voices of employees, customers and wider stakeholders: (i) the government will introduce secondary legislation which will require directors of significant size companies (both public and private) to explain how they meet the requirements under s.172 Companies Act 2006 of having regard to the interests of employees and other stakeholders; and (ii) Financial Reporting Council (FRC) launched a public consultation "on the development of a new Code principle⁶⁰¹ establishing the importance of strengthening the voice of employees and other non-shareholder interests at board level as an important component of running a sustainable business".⁶⁰² This consultation with the draft revised Code was launched in

⁵⁹⁸ Grant Thornton is a global leader in providing professional services network of independent accounting and consulting member firms which offer tax, advisory and assurance services to private businesses, public-sector entities and public interest entities.

⁵⁹⁹ 'Corporate Governance Review' (*Grant Thornton*, 2017)

<<https://www.granthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/publication/corporate-governance-review-2017.pdf>> accessed 11 March 2018.

⁶⁰⁰ 86% of the 240 respondents on question 7 – question 9 of the Green Paper believed employees' and stakeholders voice should be strengthened (para 2.3 of the government response to the green paper consultation). Available at:

'Corporate Governance Reform: The Government response to the green paper consultation' (*Department for Business, Energy and Industrial Strategy*, August 2017)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640470/corporate-governance-reform-government-response.pdf> accessed 13 March 2018.

⁶⁰¹ Principle to create the importance of strengthening employees' voice and that of the other stakeholders; and an arrangement that will need PLCs to adopt an employee engagement mechanism of either designating a non-executive director, appointing an employee director to company boards or a formal employee advisory panel.

⁶⁰² 'Corporate Governance Reform: The Government response to the green paper consultation' (*Department for Business, Energy and Industrial Strategy*, August 2017)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640470/corporate-governance-reform-government-response.pdf> accessed 8 March 2018.

December 2017 and closed on 28 February 2018.⁶⁰³ The revisions and changes in the new Code are expected to be published in the second quarter of 2018. It is anticipated that the new Code will only encompass enforcing evidence meeting s.172 Companies Act 2006 requirements by the directors and any attempt for employee engagement will be recommended on a voluntary basis to promote good corporate governance practice, for the reasons given above.

5.6 Addressing the barriers / Conclusion

The UK awaits a major change in its industrial relations. This chapter provides a significant contrast to the German model of corporate governance discussed in the previous chapter. The chapter has analysed the overall approach to employee involvement in the UK, which has evidently been concluded as *laissez-faire* despite various failed attempts by the UK government to promote board-level employee representation. In particular, the Bullock Commission's Report⁶⁰⁴ and the recent Corporate Governance Reform 2016 Green Paper.⁶⁰⁵

Considering the discussion in *Section 5.5 Corporate Governance Reform in the UK*, the writer believes that a voluntary model of employee representation in UK companies will not work. The Companies Act 2006, the UK's Corporate Governance Code or any other law in the UK does not prevent companies from appointing employee representatives to their boards. UK companies have independence on board composition, but it is evident from the data presented in *Section 5.5* that board-level employee representation has not been accepted in general. The Green Paper clearly articulated the problem and the need to strengthen employees' voice in the boardroom, but failed to effectively address it. Voluntary codes in the UK will never achieve the desired effect of strengthening employees' voice in the boardroom "since the first efforts were made to address these issues in the 1990's".⁶⁰⁶ The new

⁶⁰³ 'Proposed Revisions to the UK Corporate Governance Code' (*Financial Reporting Council*, December 2017) <<https://www.frc.org.uk/getattachment/f7366d6f-aa57-4134-a409-1362d220445b/>> accessed 12 March 2018.

⁶⁰⁴ See, *Section 5.2 History of British codetermination*.

⁶⁰⁵ See, *Section 5.5 Corporate Governance Reform in the UK*.

⁶⁰⁶ 'Association of Accounting Technicians response to Department for Business, Energy & Industrial Strategy's Green Paper "Corporate Governance Reform"' (*Association of Accounting Technicians*, 2017) <<https://www.aat.org.uk/prod/s3fs-public/assets/Corporate-Governance-Reform.pdf>> accessed 15 March 2018.

UK Corporate Governance Code⁶⁰⁷ (discussed in the previous section) will not make any fundamental changes to strengthen employees' voice in the boardroom. Rather, the new Code will merely reiterate s.172 of the Companies Act 2006 by affirming "the board's responsibility for considering the needs and views of a wider range of stakeholders" (para 26) and the board composition will remain "broadly the same" (para 46).⁶⁰⁸ Therefore, if the UK is to really embrace the idea of board-level employee representation then any such proposed measures will have to be legislative. This can be incorporated in the Companies Act 2006. Employee directors can undergo intense training on their directorial responsibilities, thereby dispelling any concerns that employee directors are unable to discharge their duties meticulously. Voluntary codes and principles are effective when providing guidance to a piece of legislation but not as a recommendation to a notion such as board-level employee representation, which has not been generally adopted by UK companies.

As analysed in *Section 5.3.1 The decline of trade unions in the UK*, most employee representation is still through trade unions, but this 'single channel' approach is outdated and on the verge of disappearing. The private sector is now characterised by workplaces with few or no trade union members; even where trade union members have a substantial presence, the employer may choose not to recognise that presence. Despite the reiterating introduction of board-level employee representation in the UK following the decline in trade union influence, board-level employee representation has still not gained acceptance or momentum as a functional substitute. This is evident by the data collected by Grant Thornton from the annual reports of FTSE 350 companies.⁶⁰⁹

Meanwhile, the customisation and limited scope of the ICE Directive by the UK legislators, which is now reflected in the ICE Regulations, renders it inadequate.⁶¹⁰ Team work, quality circles and other informal participatory measures are not widely prevalent and remain novel. These measures merely engage with employees, but in no way, do they strengthen employees' voice in the boardroom. Works councils in

⁶⁰⁷ Expected to be published in the second quarter of 2018.

⁶⁰⁸ 'Proposed Revisions to the UK Corporate Governance Code' (*Financial Reporting Council*, December 2017) <<https://www.frc.org.uk/getattachment/f7366d6f-aa57-4134-a409-1362d220445b/;.aspx>> accessed 12 March 2018.

⁶⁰⁹ See, *Section 5.5 Corporate Governance Reform in the UK*.

⁶¹⁰ See, *Section 5.3.2 ICE Regulations or 'do as you like Regulations'?*.

the UK are rare, dispersed and inconsistent in structure; therefore, they are less successful in the UK in comparison with other EU Member States. UK companies, employers' associations and even some trade unions consider works councils to be a threat to their prerogatives and powers of representation.⁶¹¹ And the flawed model of maximising shareholder primacy has led to a decline in the ways in which employees' interests may be represented in UK companies. It can also be concluded from the discussion in *Section 5.4 UK corporate governance: Shareholders vs. stakeholders*, that UK corporate governance needs to dispel with the notion of maximising 'shareholder value', which has been attributed as a flawed model. A diverse boardroom with various stakeholder representatives, especially employee representatives will minimise short-sighted and risky decision-making.

In summary, the UK's position can be described as one of falling trade union membership, ineffective employee information and consultation mechanisms, unreceptive works councils and a corporate governance structure that is long outdated.

So, what can the SE do to fill the gap? Can it help to develop a culture of functional and beneficial codetermination in the UK? The key aspects of the SE that will be beneficial to the UK have already been identified in *Chapters 2 and 3*. The SE has laid the foundation of an EU company model but it has not gained popularity in the UK. The UK government is partly to blame as it did not effectively run the consultation process: the European Public Limited-Liability Company Regulations 2004, being a statutory instrument, did not require parliamentary debate. As a result, there has been little awareness of the SE model amongst UK businesses and professional bodies. One consultative document was published in October 2003, which covered both the SE Directive and the SE Regulation.⁶¹² The government had already hinted that it wants to make minimum changes to the existing rules and has stressed that establishing an SE will be completely voluntary. Adopting this attitude explains why there were only 22 consultation responses (mainly from professional bodies like the Confederation of British Industry (CBI), the Institute of Chartered

⁶¹¹ P Bri  ne and C Nicholson, 'Employee Empowerment- Towards Greater Workplace Democracy' (2012) CentreForum 32-33.

⁶¹² European Public Limited-Liability Company Regulations 2004, SI 2004/2326.

Accountants in England and Wales (ICAEW), and the Trade Unions Congress (TUC).⁶¹³

One effective way to increase awareness of the SE and advertise the advantages of employee involvement will be to re-open the consultation process on SE and employee involvement. The government could propose mandatorily introducing one-third board-level employee representation in companies with more than 500 employees. Laws alone cannot accomplish better industrial relations; there must be a transition in industrial traditions as well. A new consultation will ensure that the issue is debated at the national level.

Secondly, HM Revenue and Customs should propose corporation tax incentives for companies setting up as an SE or companies which qualify for board-level employee representation. Tax is not specifically covered by the ECS; current UK tax provisions provide no such incentive, and have been considered an impediment to the growth of employee ownership. A proposal of this kind will ensure the government's commitment to employee involvement and make it more attractive to UK companies. One might offer a counterargument that, at a time when the UK is recovering from financial deficits, a 1% corporation tax discount may cost around £1bn to the Exchequer.⁶¹⁴

The UK has sensibly chosen tailor-made tax provisions for some transactions affecting the SEs outside the scope of UK Company Law; for example, the formation of an SE by a cross-border merger or transfer of an SE registered office. It was anticipated that the intention of particular tax provisions will deliver business certainty. Another incentive could be to lower the level of national insurance contributions paid by employees employed by an SE or a qualifying company with employee representatives.⁶¹⁵ Financial lending institutions can be encouraged to provide loans at attractive rates to the SEs or qualifying companies that advance

⁶¹³ 'DTI Consultations' (*The National Archives*, 2003)
<<http://webarchive.nationalarchives.gov.uk/20031220222703/http://www.dti.gov.uk/consultations/>>
accessed 19 March 2016.

⁶¹⁴ Ibid.

⁶¹⁵ Ibid.

employee involvement. These efforts will outweigh the legal and regulatory complexities in setting up an SE.

CHAPTER 6- CASE STUDY: EMPLOYEE REPRESENTATION IN SELECTED MEMBER STATES

6.1 Introduction

Employee representation rights across the EU have remained a contentious issue. Factors such as industrial relations systems, and customs influenced by public policy, deregulation, law, privatisation, demographic background, technological changes and social attitudes have all contributed towards the controversy in every Member State. In the past two decades, Member States have taken various initiatives to accommodate direct and indirect employee representation, but consistency is still far from being achieved. Attitudes vary across the EU; even neighbouring Member States demonstrate significant differences in employee representation characteristics. Some provide extensive employee representation rights; others have no legal provisions to secure employee representation rights at all.

Despite these variations, the EU strives to create a 'social dialogue', which is perceived as an element of economic and social modernisation in addition to democratic government.⁶¹⁶ The possibility to create a working dialogue between employees and companies is understood as a key complement to EU laws in accomplishing economic growth⁶¹⁷ and social cohesion.⁶¹⁸

Board-level employee representation was a phenomenon that was mainly prevalent in Germany until the 1970's. Since its establishment in iron and steel industry in 1951, board-level employee representation is now extensively found in all large German companies and companies in excess of 2000 employees are benefitted with

⁶¹⁶ Commission, 'The European Social Dialogue: A force for Innovation and Change' COM (2002) 341, p6.

⁶¹⁷ From an economic standpoint, employee involvement results in simplifying exchange of information, reducing transaction costs and agency costs etc.

⁶¹⁸ From a social standpoint, employee involvement raises a platform for fairness and employees are able to negotiate their engagement terms (see, *Chapter 2- Justifying Employee Involvement in Corporate Governance*).

near-parity representation.⁶¹⁹ Figure 5 below depicts a map of board-level employee representation in companies across the EU at national level and is categorised as the following: (i) mainly found in public-sector companies; (ii) found in private and public-sector companies; and (iii) no board-level employee representation.

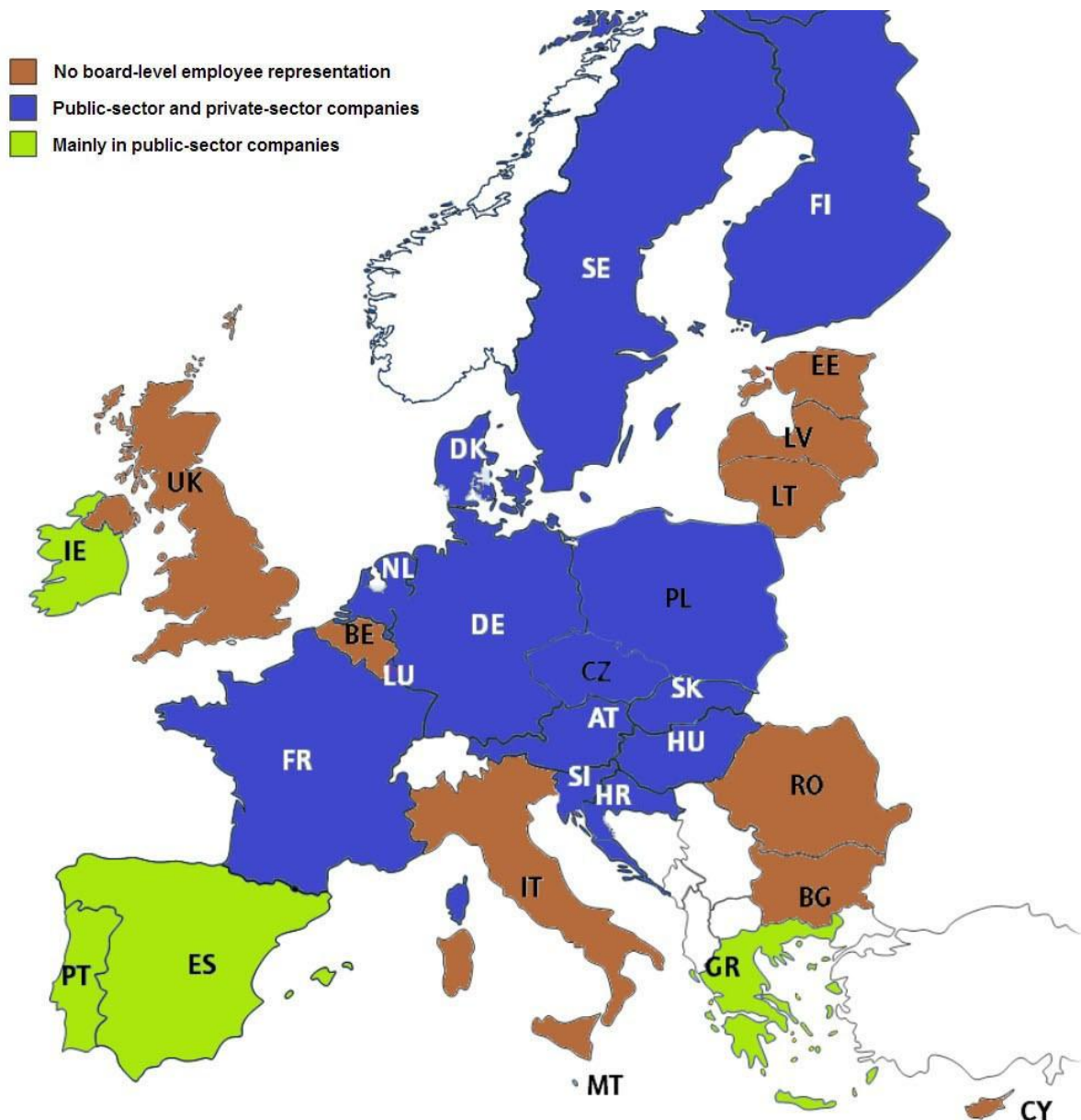


Figure 5- Board-level employee representation across the EU at national level

The UK, Bulgaria, Romania, Belgium, Italy, Estonia, Cyprus, Malta, Lithuania and Latvia provide no national legal obligation for companies to mandate board-level

⁶¹⁹ M Gold, 'Taken on Board: An evaluation of the influence of employee board-level representatives in company decision-making across Europe' (2011) 17 (1) European Journal of Industrial Relations 41.

employee representation. Other Member States that do provide board-level employee representation usually have a lower proportion; the exception is Germany.⁶²⁰ The percentage of companies with some sort of official board-level employee representation is more than 50% in France, Denmark and Sweden (this includes both private and public-sector companies).⁶²¹ This percentage is less than 20% in Spain, Greece, Ireland, Portugal and the Czech Republic, where board-level employee representation is restricted to public-sector companies.⁶²²

The present literature on international comparative studies of board-level employee representation is principally qualitative and has mixed conclusions.⁶²³ There are hardly any quantitative studies econometrically comparing the differences in Member States of the effect of board-level employee representation on company performance.⁶²⁴ Berg et al. quote Bryson and Frege's⁶²⁵ finding that, 'despite the growth in comparative company information, studies that evaluate and contrast findings across states are scarce'.⁶²⁶ Bryson et al. also concur that empirical studies into the occurrence, outcomes and determinants of board-level employee representation are almost non-existent.⁶²⁷

The key significance of this chapter is to analyse the variation in attitude on board-level employee representation across the EU, which is also attributed to the

⁶²⁰ 'A Review of Developments in European Industrial Relations' (*European Industrial Relations Observatory Annual Review*, 1998) <<http://www.uni-mannheim.de/edz/pdf/ef/eirobserver/annualreview/ef9920en.pdf>> accessed 11 June 2016.

⁶²¹ Bryson et al., 'Workplace Employee Representation in Europe' (*Sheffield University*, July 2012) <https://www.sheffield.ac.uk/polopoly_fs/1.247210!/file/D3_forth.pdf> accessed 28 June 2016.

⁶²² Ibid.

⁶²³ See, B Keller and S Weber, 'Sectoral Social Dialogue at EU Level: Problems and Prospects of Implementation' (2011) 17 (3) *European Journal of Industrial Relations* 227-243.

⁶²⁴ van den Berg et al., 'The Impact of Representative Employee Participation on Organisational Performance- A Comparison of Four Neighbouring Countries- Belgium, Germany, the Netherlands and the United Kingdom' (2011) University of Antwerp Working Paper D/2011/1169/019 ACED/2011/013 <http://www.ilpc.org.uk/Portals/56/ilpc2012-paperupload/ILPC2012paper-ACED%20working%20paper%20Van%20den%20Berg%20et%20al%202011_20120314_025217.pdf> accessed 30 July 2016.

⁶²⁵ A Bryson and C Frege, 'The Importance of Comparative Workplace Employment Relations Studies' (2010) 48 (2) *British Journal of Industrial Relations* 232.

⁶²⁶ van den Berg et al., 'The Impact of Representative Employee Participation on Organisational Performance- A Comparison of Four Neighbouring Countries- Belgium, Germany, the Netherlands and the United Kingdom' (2011) University of Antwerp Working Paper D/2011/1169/019 ACED/2011/013 <http://www.ilpc.org.uk/Portals/56/ilpc2012-paperupload/ILPC2012paper-ACED%20working%20paper%20Van%20den%20Berg%20et%20al%202011_20120314_025217.pdf> accessed 30 July 2016.

⁶²⁷ Bryson et al., 'Workplace Employee Representation in Europe' (*Sheffield University*, July 2012) <https://www.sheffield.ac.uk/polopoly_fs/1.247210!/file/D3_forth.pdf> accessed 28 June 2016.

ambiguous factor of its classification whether under company law or labour law. This ambiguity in classification makes the provisions on board-level employee representation much intricate in Member States that have any legal basis of employee representation. This chapter makes an attempt to lay the foundation for future quantitative studies and an established qualitative conclusion for prospective international comparative research in the years to come. It explores the variation in attitudes to board-level employee representation across the EU, and the system of board-level employee representation in the shortlisted Member States mentioned above.⁶²⁸ The analysis will be followed by a case study on board-level employee representation in carefully shortlisted Member States like Denmark, Poland and France. This comparative and exploratory work will form the basis of an argument supporting the establishment of a uniform system of board-level employee representation in the shape of an SE.

6.2 The separation of employees between company law and labour law

One prominent reason for variable board-level employee representation perspectives within the Member States is the controversial question whether it falls under company law or labour law. This difficulty plays a significant role in determining the acceptance of board-level employee representation provisions among company actors and other third-party stakeholders. Despite the attempts to harmonise company and labour law, they remain two different schools of thought for legal scholarship, political reality or regulatory policy.⁶²⁹ Some scholars have suggested that discounting labour matters from corporate governance can be justified based on two factors: the strong separation of labour between labour law and company law; and the fact that corporate governance is encompassed within the scope of company law.⁶³⁰ Greenfield notes that corporate law is predominantly about shareholders and directors, and seldom are the interests of other stakeholders considered.⁶³¹ It is rare

⁶²⁸ Reviewing the institutional settings of the Member States and contemplating current empirical and academic literature.

⁶²⁹ MM Botha, 'The Different Worlds of Labour and Company Law: Truth or Myth?' (*Potchefstroom Electronic Law Journal*, 2014) <<http://www.saflii.org/za/journals/PER/2014/56.pdf>> accessed 15 July 2016..

⁶³⁰ A Conchon, 'Employee Representation in Corporate Governance: Part of the Economic or the Social Sphere?' (2011) European Trade Union Institute Working Paper 2011.08 <<http://ssrn.com/abstract=2221786>> accessed 28 July 2016.

⁶³¹ K Greenfield, 'The Place of Workers in Corporate Law' (1998) 39 (2) Boston College Law Review 283.

that corporate law will reflect the relationship between the company and employees, simply because the interests of employees are matters of employment and labour law.⁶³² Conchon in the European Trade Union Institute Working Paper quotes Simon Deakin in identifying the challenges faced by courts of justice as a result:

*“The implicit assumptions of company law, particularly during a period when shareholder value is to the fore, often run counter to those of labour law, so that complementarity is hard to achieve. This gives rise to interesting issues concerning which field has priority in specific contexts (corporate restructuring being the most obvious). Courts have to use techniques reminiscent of the conflict of laws to resolve these tensions, which cannot be solved by merging the two fields except in the sense of completely subordinating one set of values and goals to the other.”*⁶³³

The boundaries between company and labour law have steadily distorted over time, making jurisprudence and the production of legal rules more complicated. As a result, board-level employee representation remains an outstanding issue for EU legislators: should provisions be cast under labour law or company law? Board-level employee representation, along with employee information and consultation, certainly falls under the umbrella of ‘employee involvement’, which is incorporated in the legal domain as a set of provisions relating to labour law.⁶³⁴ This is because employee involvement (board-level employee representation, information and consultation) is encompassed in Article 153 of The Treaty on European Union, whose addition in the Treaty through the integration of the Protocol on Social Policy to the Maastricht Treaty instituting the EU, is intended to relate to labour law. In essence, the wordings of Article 153 are a reflection of the European Labour Law more than anything else. Paragraph 1 of Article 153 of The Treaty on European Union reads:

“...the Union shall support and complement the activities of the Member States in the following fields: (a) improvement in particular of the working environment to protect

⁶³² Ibid.

⁶³³ A Conchon, ‘Employee Representation in Corporate Governance: Part of the Economic or the Social Sphere?’ (2011) European Trade Union Institute Working Paper 2011.08: <<http://ssrn.com/abstract=2221786>> accessed 28 July 2016.

⁶³⁴ Ibid.

workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; (i) equality between men and women with regard to labour market opportunities and treatment at work; (j) the combating of social exclusion; (k) the modernisation of social protection systems without prejudice to point (c)."

There are, however, two reasons why board-level employee representation, like employee information and consultation, might not fall under European law.⁶³⁵ First, different law-making processes govern the regulation of information and consultation, in comparison with representation. Article 153 of The Treaty on European Union provides for a separate handling of representation by laying down the specificity of its related law-making processes, thereby differentiating it from information and consultation. Article 153, §5 provide that unanimous agreement is necessary for the Council after dialogue between the Committee of the Regions, the Economic and Social Committee and the European Parliament (special legislative procedure). Contrariwise, Article 153, §4 provides that law on information and consultation requires the European Parliament and the Council to act together after dialogue with the Committee of the Regions and the Economic and Social Committee (ordinary legislative procedure).⁶³⁶

Secondly, the 'anchorage' of EU law on board-level employee representation lies in separate legal principles in comparison with the law on information and consultation mechanisms. The EWC Directive and the ICE Directive⁶³⁷ (both particularly

⁶³⁵ A Conchon, 'Employee Representation in Corporate Governance: Part of the Economic or the Social Sphere?' (2011) European Trade Union Institute Working Paper 2011.08 <<http://ssrn.com/abstract=2221786>> accessed 28 July 2016.

⁶³⁶ See, F Dorssemont, 'Worker Involvement in Secondary EC Law Prior to the Recast Directive' in F Dorssemont and T Blanke (eds), *The Recast of the European Works Council Directive* (Antwerpen: Intersentia 2010) 35.

⁶³⁷ Council Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L80.

dedicated to company-level employee information and consultation) are established on the legal basis of Article 153 The Treaty on European Union. On the other hand, the SE Directive⁶³⁸ and SCE Directive⁶³⁹ (both particularly dedicated to employee representation) are anchored in an entirely different legal basis whose relationship with labour law is rather obscure. This is because Article 352 is not provided under the 'social policy'⁶⁴⁰ part of the Treaty, but is listed under an unclear part of the Treaty called 'general and final provisions'⁶⁴¹. Also, before anchoring the ECS in Article 352 of The Treaty on European Union, EU legislators perceived board-level employee representation and the SE Directive as being within the parameter of freedom of establishment, with a view to achieving a single market (an issue dealt within company law).

Further, legal scholarship is divided regarding the question of whether the ECS is within the scope of labour or company law. For example, labour law experts like Blanpain⁶⁴²; De Vos⁶⁴³; Neumann⁶⁴⁴ and Neal⁶⁴⁵ in their research interpret the ECS within the scope of labour law. In contrast, company law experts like Andenas and Wooldridge⁶⁴⁶; Grundmann and Möslin⁶⁴⁷; and Hopt and Wymeersch⁶⁴⁸ interpret the ECS within the scope of company law.⁶⁴⁹ Policymakers also evaluate and incorporate board-level representation differently in their own Member States. Table 11 below represents the existing board-level employee representation legislation in Member States and its scope:

⁶³⁸ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294/22.

⁶³⁹ Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [2003] OJ L207.

⁶⁴⁰ Title X, The Treaty on European Union.

⁶⁴¹ Part 7, The Treaty on European Union.

⁶⁴² R Blanpain, *European Labour Law* (11th edn, Kluwer Law International 2008).

⁶⁴³ M De Vos, *European Community- Employment and Labour Law: Law and Cases* (Herentals: Mijn Wetboek 2007).

⁶⁴⁴ D Neumann, *European Labour Law. Directives, Regulations, Conventions* (European Law Publishers 2003).

⁶⁴⁵ AC Neal, *European Labour Law and Social Policy: Cases and Materials* (2nd edn, Kluwer Law International 2002).

⁶⁴⁶ M Andenas and F Wooldridge, *European Comparative Company Law* (Cambridge University Press 2009).

⁶⁴⁷ S Grundmann and F Möslin (2007) *European Company Law? Organization, Finance and Capital Markets* (Intersentia Rechtswetenschappen 2007).

⁶⁴⁸ KJ Hopt and E Wymeersch, *European Company and Financial Law: Texts and Leading Cases* (4th edn, Oxford University Press 2009).

⁶⁴⁹ A Conchon, 'Employee Representation in Corporate Governance: Part of the Economic or the Social Sphere?' (2011) European Trade Union Institute Working Paper 2011.08 <<http://ssrn.com/abstract=2221786>> accessed 28 July 2016.

Member State	Legal Provisions	Scope
Austria	<i>Arbeitsverfassungsgesetz, ArbVG § 110 1974</i> (Labour Constitution Act 1974)	Company law
Czech Republic	<i>Zákon č. 77/1997 Sb., o státním podniku 1997</i> (Act n°77/1997 Coll., on state enterprises 1997)	Company law
Czech Republic and Slovakia	<i>Zákon č. 111/1990 z 19. apríla 1990 o štatnom podniku 1990</i> (Act n° 111/1990 of 19 April 1990 on state enterprise 1990)	Company law
	<i>Zákon č. 513/1991 Sb., obchodní zákoník 1991</i> (Act n° 513/1991 Coll., Commercial Code 1991)	Company law
Denmark	<i>lov nr. 370 fra 13. juni 1973 om aktieselskaber</i> (Act n°370 of 13 June 1973 on public limited companies)	Company law
	<i>lov nr. 371 af 13. juni 1973 om anpartsselskaber 1973</i> (Act n°371 of 13 June 1973 on private limited companies 1973)	Company law
Finland	<i>Laki 725/1990 henkilöstön edustuksesta yritysten hallinnossa 1990</i> (Act 725/1990 on personnel representation in the administration of undertakings 1990)	Labour law
France	<i>Loi 83-675 de Democratization du secteur public 1983</i> (Act 83-675 on the democratisation of the public sector 1983)	Labour law
	<i>Ordonnance 86-1135 modifiant la loi 66-537 sur les sociétés commerciales 1986</i> (Edict 86-1135 modifying Act 66-537 on commercial companies 1986)	Labour law
	<i>Loi 94-640 relative a l'amelioration de la participation des salaries dans l'entreprise 1994</i> (Act 94-640 on enhancing employees' participation in the company 1994)	Labour law
	<i>Loi constitutionnelle de modernisation des institutions de la Ve République 2008</i> (Constitutional law on the Modernisation of the Institutions of the Fifth Republic 2008)	Labour law
	<i>La loi relative au dialogue social et à l'emploi 2015</i> (Law on Labour Relations and Employment 2015)	Labour law
Germany	<i>Montan-Mitbestimmungsgesetz - Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie vom 21. Mai 1951</i> (Mining Co-determination Act - Act on the participation of employees in the supervisory boards and boards of companies in the mining and iron and steel industry of 21 May 1951)	Labour law
	<i>Betriebsverfassungsgesetz vom 11. Oktober 1952</i> (Works constitution Act of 11 October 1952)	Labour law
	<i>Mitbestimmungsgesetz vom 4. Mai 1976</i> (Co-determination Act of 4 May 1976)	Labour law
Greece	<i>Νόμος 1365/1983, Κοινωνικοποίηση των Επιχειρήσεων δημοσίου χαρακτήρα ή κοινής ωφελειας 1983</i> (Act 1365/1983, Socialisation of state-run undertakings and utilities 1983)	Insufficient data
Hungary	<i>1988. évi VI. Törvény, A gazdasági társaságokról 1988</i> (Act VI of 1988 on Business Associations 1988)	Company law
Ireland	<i>Worker Participation (State Enterprises) Act No 6/1977</i>	Labour law
Luxembourg	<i>Loi du 6 mai 1974 instituant des comités mixtes dans les</i>	Labour law

<i>Member State</i>	<i>Legal Provisions</i>	<i>Scope</i>
	<i>entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes</i> (Act of 6 May 1974 establishing joint committees in the private sector and organising the representation of employees in public limited companies)	
Netherlands	<i>De Wet van 6 mei 1971 (S 289) houdende voorzieningen met betrekking tot de structuur der naamloze en besloten vennootschap (Structuurwet)</i> (Act of 6 May 1971 (S 289) establishing provisions for the structure of public and private limited companies (Structure law))	Company law
Poland	<i>Ustawa z dnia 25 września 1981 r. o przedsiębiorstwach państwowych</i> (Act of 25 September 1981 on state enterprises) <i>Ustawa z dnia 30 sierpnia 1996 r. o komercjalizacji i prywatyzacji przedsiębiorstw państwowych</i> (Act of 30 August 1996 on the commercialisation and privatisation of state enterprises)	Company law Company law
Portugal	<i>Lei nº 46/79 de 12 de Setembro - Comissões de trabalhadores 1979</i> (Act n°46/79 of 12 September 1979 on works councils)	Labour law
Slovenia	<i>Zakon o sodelovanju delavcev pri upravljanju - ZSDU (Uradni list RS, št. 42/93 z dne 22. 7. 1993)</i> (Act on Worker Participation in Management - SDU (Official Gazette RS, no. 42/93 of 22 July 1993))	Company law
Sweden	<i>Lag (1976:351) om styrelserepresentation för de anställda i aktiebolag och ekonomiska föreningar</i> (Act 1976:351 on employee representation on board of companies and economic associations)	Labour law

Table 11- Board-level employee representation provisions and their scope in Member States⁶⁵⁰

Almost half of the Member States listed in *Table 11- Board-level employee representation provisions and their scope in Member States*, classify board-level employee representation within the scope of company law, and the other half within the scope of labour law. One plausible reason for this could be that, in half of the Member States, the labour ministry must have taken the lead on initiating the bill or at the concluding proclamation of the legislation, putting the legislation within the scope of labour law, whereas in other Member States like the Czech Republic, Slovakia and Denmark, board-level employee representation is integrated as a sub-section of the commercial code, therefore placing it within the scope of company law.⁶⁵¹ This separation between company law and labour law has made it difficult to achieve uniformity when applying EU laws on employee involvement as there is a

⁶⁵⁰ Ibid.

⁶⁵¹ Ibid.

great deal of latitude in its interpretation, thereby challenging the scope to achieve a 'single market'.

6.3 Employee representation in shortlisted Member States

Employee representation in both public-sector and private-sector companies has been officially recognised across most Member States in the EU and is organised in each individual Member State by systems such as trade unions, works councils and board-level representation. The particular nature of industrial relations in each Member State generates a great deal of variance in employee representation across the EU. As mentioned in the chapters discussed earlier, there have been variable conclusions on the issue of employee involvement, especially board-level employee representation in companies across the EU. Academics have suggested that the types of representation adopted are largely influenced by national culture, competition, union membership, sector and the size of the organisation.⁶⁵² Cabrera et al. argue in their working paper 'Employee Participation in Europe' that the national culture in which the company operates influences the degree of representation and is a prevailing factor in explaining organisational behaviour.⁶⁵³ They suggest that 'a company's competition level will be positively linked to employee representation; union membership will be negatively linked to employee representation; size of the organisation will be positively linked to employee representation and there will be a higher employee representation in the service sector in comparison with the manufacturing sector.'⁶⁵⁴

This hypothesis to some extent generalises the determinants of employee representation. It is plausible that national culture is one of the most prominent factors that determine the degree of employee representation adopted by legislators in their own Member State.⁶⁵⁵ However, the following case studies will demonstrate that employee representation does not depend on union membership, size of the

⁶⁵² Cabrera et al., 'Employee Participation in Europe' (2001) Universidad Carlos Working Paper 01-6 <<http://e-archivo.uc3m.es/bitstream/handle/10016/53/wb010602.pdf?sequence=1>> accessed 18 July 2016.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid.

⁶⁵⁵ See, C Pavett and T Morris, 'Management Styles within a Multinational Corporation: A Five Country Comparative Study' (1995) 48 (10) Human Relations 1171-1191.

organisation or the sector in which a company operates, albeit these factors do influence employee involvement in some Member States.

As illustrated in *Figure 5- Board-level employee representation across the EU at national level* earlier, board-level employee representation across Member States varies significantly. The following table collates data by comparing some board-level employee representation features across the EU.

<i>Member State</i>	<i>Corporate governance</i>	<i>Regulation (public-sector)</i>	<i>Regulation (private-sector)</i>	<i>Scope</i>	<i>Proportion or number of Employees' representatives</i>	<i>Nomination of representatives and appointment mechanism</i>	<i>Eligibility criteria</i>
Austria	Dualistic	Yes	Yes	Ltd. companies > 300 employees	One-third of supervisory board	Appointment by works council.	Only works council members (having active voting rights, i.e. only employees)
Belgium	Monistic	No	No				
Bulgaria	Monistic and dualistic (option)	No	No				
Croatia	Monistic and dualistic (only PLCs can opt monistic)	Yes	Yes	Ltd. companies > 200 employees	One board member	A. Appointment by works council. If none, then: B. Appointment by trade unions or a group of employees supported by at least 10% of the workforce. Appointment- Election by employees.	A. No restrictions B. Only employees
Cyprus	Monistic	No	No				
Czech Republic	Dualistic	Yes	Yes	A. PLCs >50 employees (or <50 employees if provided for by articles of association) B. Public-sector companies	A. One-third of supervisory board (up to half if provided for by articles of association) B. One-third of supervisory board	A. Appointment by management board and trade unions/ works council or a group of employees supported by at least 10% of the workforce. Appointment- Election by employees. B. Electoral regulations set up by employer in accord with any trade unions. Appointment- Election by employees.	A. Employees or external trade union representatives B. Only employees
Denmark	Monistic and dualistic (option)	Yes	Yes	PLCs and Ltd. companies >35 employees	One-third of board with a minimum of two members (minimum three members on the parent company's board of a group falling within the regulation's scope).	No specific legal procedure. Appointment- Election by employees.	Only employees

<i>Member State</i>	<i>Corporate governance</i>	<i>Regulation (public-sector)</i>	<i>Regulation (private-sector)</i>	<i>Scope</i>	<i>Proportion or number of Employees' representatives</i>	<i>Nomination of representatives and appointment mechanism</i>	<i>Eligibility criteria</i>
Estonia	Dualistic	No	No				
Finland	Monistic and dualistic (option)	Yes	Yes	PLCs and Ltd. companies >150 employees and application by two personnel groups jointly representing employees	Arrangement between employer and at least two personnel groups which represents a majority with respect to number of representatives (unrestricted) and the body of their representation. If there is no arrangement, then minimum standards applicable: one-fifth of the board (maximum four) and the employers decide on which board the representatives will sit (supervisory, management or board of directors).	Nomination is by personnel groups. Appointment- Election by employees.	Only employees
France	Monistic and dualistic (option)	Yes	Yes	A. Private-sector companies B. Privatised companies C. Private sector PLCs (voluntary) D. Private sector PLCs (compulsory)	A. Two members and up to one-third of the board in companies with <200 employees. One-third of the board in companies with >200 employees. B. One to three members subject to the relevant privatisation Act and the board size. C. Up to one-fourth of the board (maximum four members or maximum five members in listed companies with a board of directors). D. Less than and equal to 12 board members (minimum one)	A. Representatives backed by trade unions or supported by at least 10% of the workforce. Appointment- Election by employees. B. Representatives backed by trade unions or supported by at least 5% of the workforce (or 100 employees in companies >2,000 employees). Appointment- Election by employees. C. Representatives backed by trade unions or supported by at least 5% of the workforce (or 100 employees in companies >2,000 employees). Appointment- Election by employees. D. Following works council's opinion, the general meeting of	Only employees

<i>Member State</i>	<i>Corporate governance</i>	<i>Regulation (public-sector)</i>	<i>Regulation (private-sector)</i>	<i>Scope</i>	<i>Proportion or number of Employees' representatives</i>	<i>Nomination of representatives and appointment mechanism</i>	<i>Eligibility criteria</i>
				>5,000 employees in France or >10,000 globally	with >5,000 employees in France and more than 12 board members (minimum two) with >10,000 employees globally.	shareholders may choose the following: (i) trade unions (appointment- election by employees); (ii) appointment by works council; (iii) appointment by TU; and (iv) one employee representative is appointed as (i), (ii) or (iii) and the other by the European works council or the SE works council.	
Germany	Dualistic	Yes	Yes	<p>A. PLCs, Ltd. companies, cooperatives and partnership limited by shares (KGaA) with 500 - 2,000 employees</p> <p>B. PLCs, Ltd. companies, cooperatives and partnership limited by shares (KGaA) with >2,000 employees</p> <p>C. Iron, coal and steel companies >1,000</p>	<p>A. One-third of supervisory board</p> <p>B. Half of supervisory board (one member must be an executive manager)⁶⁵⁶</p> <p>C. Half of supervisory board⁶⁵⁷ and de facto one managerial board member.</p>	<p>A. Nomination of representatives by works council or employees (10% or 100). Appointment- Election by employees.</p> <p>B. Nomination of representatives via election by employees (20% or 100). Also, trade unions can also nominate two or three representatives. Appointment- Election by employees or by delegates in companies with >8,000 employees.</p> <p>C. Nomination of some representatives by works council and some by trade unions. Appointment- By the shareholders' general meeting.</p>	<p>A. One or two representatives-only employees; but if > two representatives- at least two employees</p> <p>B. Employees or trade union representatives (external)</p> <p>C. Employees; trade union officials (external); or an 'extra member' (not a trade</p>

⁶⁵⁶ It is interesting to note that the in the event of a tie, the chairman of the supervisory board, who is appointed by the shareholders, has a deciding vote on the matter.

⁶⁵⁷ A 'neutral external person' also sits on this board in agreement with both sides.

<i>Member State</i>	<i>Corporate governance</i>	<i>Regulation (public-sector)</i>	<i>Regulation (private-sector)</i>	<i>Scope</i>	<i>Proportion or number of Employees' representatives</i>	<i>Nomination of representatives and appointment mechanism</i>	<i>Eligibility criteria</i>
				employees			union official or an employee)
Greece	Monistic	Yes		Public-sector companies	One to two board members	Nominations of representatives legally are done by employees. Nominations of representatives de facto are done by TU fractions. Appointment- Election by employees (official appointment by the relevant minister).	Only employees
Hungary	Monistic and dualistic (only PLCs can opt monistic structure)	Yes	Yes	PLCs and Ltd. companies >200 employees	In monistic structure companies, it is in accordance with an agreement between board of directors and works council. In dualistic structure companies, one-third of supervisory board (save for any agreement by the management and works council).	Nomination of representatives is by works council, although obliged to ask trade unions for their view. Appointment- By the shareholders' general meeting.	Only employees
Ireland	Monistic	Yes		Private-sector commercial companies and state agencies	One-third of the board	Nomination of representatives by bodies recognised for collective bargaining or trade unions. Election by employees (official appointment by the relevant minister).	Only employees
Italy	Monistic and dualistic (option)	No	No				
Latvia	Dualistic	No	No				
Lithuania	Monistic and dualistic (option)	No	No				
Luxembourg	Monistic and dualistic (option)	Yes	Yes	A. PLCs >1,000 employees B. Private-sector companies	A. One-third of the board B. One board member for every 100 employees (minimum 3	A. Appointment- Election by staff representatives (save for in the iron and steel industry). B. Appointment- Election by staff representatives.	A. Only employees (save for in the iron and steel industry) B. Only employees

Member State	Corporate governance	Regulation (public-sector)	Regulation (private-sector)	Scope	Proportion or number of Employees' representatives	Nomination of representatives and appointment mechanism	Eligibility criteria
				(the state or state concession holds minimum 25% of shares)	members and maximum one-third of the board).		
Malta	Monistic	No	No				
Netherlands	Monistic and dualistic (option)	Yes	Yes	'Structuur' PLCs and Ltd. companies, i.e. companies with: (i) equity capital >16 M€; (ii) a works council; and (iii) >100 employees, including subsidiaries ⁶⁵⁸	In monistic structure companies, it is one-third of the non-executive directors' seats. In dualistic structure companies, one-third of supervisory board.	Nomination of representatives is by works council. Appointment- By the shareholders' general meeting.	Employees and trade unionists are not involved in collective bargaining agreements with the management.
Poland	Dualistic	Yes	Yes	Commercialised companies ⁶⁵⁹ and privatised companies ⁶⁶⁰	Two-fifth of supervisory board in commercialised companies. Minimum two-four members of the supervisory board (depending on the size of supervisory board) in privatised companies. Further, one member of management board in companies >500 employees.	No restrictions regarding the nomination of representatives. Appointment- Election by employees.	No restrictions
Portugal	Monistic and dualistic (option)	Yes		Private-sector companies	As per individual company's articles of association.	Nomination of representatives is by works council or 100 or 20% of employees. Appointment- Election by employees.	Only employees

⁶⁵⁸ Few exceptions apply.

⁶⁵⁹ Commercialised companies are public-sector companies converted into Ltd. companies or PLCs with the State being the sole shareholder. Public-sector companies in Poland continue to be governed by *Act of 25 September 1981 on state enterprises* on employees' self-management.

⁶⁶⁰ Privatised companies are companies in which the State is no longer the sole shareholder.

<i>Member State</i>	<i>Corporate governance</i>	<i>Regulation (public-sector)</i>	<i>Regulation (private-sector)</i>	<i>Scope</i>	<i>Proportion or number of Employees' representatives</i>	<i>Nomination of representatives and appointment mechanism</i>	<i>Eligibility criteria</i>
Romania	Monistic and dualistic (option)	No	No				
Slovakia	Dualistic	Yes	Yes	A. PLCs >50 employees or <50 employees if provided under articles of association B. Private-sector companies	A. One-third of supervisory board and up to half of supervisory board if provided under articles of association. B. Half of supervisory board ⁶⁶¹	A. Nomination of representatives is by trade unions or employees (10%). Appointment- Election by employees. B. Appointment- Election by employees and if there is any trade union then direct appointment of one of the board members (employee side).	A. No restrictions B. Only employees (trade union members only eligible for trade union seat)
Slovenia	Monistic and dualistic (only PLCs can opt monistic)	Yes	Yes	PLCs and Ltd. companies that satisfy two of the following (i) >50 employees; (ii) sales turnover >8.8 M€; and (iii) asset value >4.4 M€	In dualistic structure companies, between one-third and half of supervisory board ⁶⁶² , as provided under articles of association. In monistic structure companies, one-fourth of the board and minimum one member, as provided under articles of association.	Appointment- By works council.	Only employees
Spain	Monistic	Yes		Public-sector companies >1,000 employees Public-sector companies (metal sector)	Two to three members (one member per entitled participating trade union)	Trade unions participation allowed. ⁶⁶³	No restrictions

⁶⁶¹ Save for the chair.

⁶⁶² Ibid.

⁶⁶³ Representing a minimum of 25% works councils and employee representatives and seats.

Member State	Corporate governance	Regulation (public-sector)	Regulation (private-sector)	Scope	Proportion or number of Employees' representatives	Nomination of representatives and appointment mechanism	Eligibility criteria
				>500 Employees			
Sweden	Monistic	Yes	Yes	PLCs and Ltd. companies >25 employees ⁶⁶⁴	Two members in companies with <1,000 employees. Three members in companies with >1,000 employees and operational in various industries. The maximum number could only be the half of the board.	Appointment by trade unions is guaranteed by collective arrangement with the company. ⁶⁶⁵	Generally, employees ⁶⁶⁶
United Kingdom	Monistic	No	No				

Table 12- Variable features of board-level employee representation across Member States⁶⁶⁷

⁶⁶⁴ Additionally, decision by local trade union is guaranteed by collective arrangement with the company.

⁶⁶⁵ Regarding the distribution of seats between trade unions, the standard rule will be applicable if there is no agreement among trade unions.

⁶⁶⁶ Not mandatory.

⁶⁶⁷ Table includes own research and is largely based on:

'Employee Representation and Information, Consultation and Co-Determination Rights in Europe' (*Practical Law*, 1 November 2015) <<http://uk.practicallaw.com/9-503-2690?q=&qp=&qo=&qe=>> accessed 16 January 2018;

A Conchon, 'Board-Level Employee Representation Rights in Europe: Facts and Trends' (*European Trade Union Institute*, 2011)

<https://www.etuc.org/IMG/pdf/2011_ETUI_Report___Board_level_employee_representation_rights_in_Europe.pdf> accessed 18 January 2018; and

Hornuf et al., 'The Economic Impact of Forming a European Company' (*SSRN*, 15 November 2016) <<https://ssrn.com/abstract=2837009>> accessed 17 January 2018

Ten Member States do not have any national regulation on board-level employee representation (Belgium, Bulgaria, Cyprus, Estonia, Italy, Latvia, Lithuania, Malta, Romania and the United Kingdom). Four Member States have regulations only in the public-sector (Greece, Ireland, Portugal and Spain). The remaining 14 Member States have regulations found in both public-sector and private-sector companies (Austria, Croatia, Czech Republic, Finland, Denmark, France, Germany, Hungary, Luxembourg, Netherland, Poland, Slovakia, Slovenia and Sweden). *Table 12- Variable features of board-level employee representation across Member States* also illustrates that, in addition to the nature of company (public or private), board-level employee representation also depends on the 'scope and size'⁶⁶⁸ of the company and corporate governance structure.

Member States with different board-level employee representation perspectives are shortlisted in the following case studies.

6.3.1 Case study: Denmark

Denmark provides a substantial comparison with other Member States. Denmark accepted the ECS without argument, because the country already has strong board-level employee representation rights. It is also an interesting comparison because it has the highest employee representation rate according to the European Participation Index (EPI) 2.0.

The EPI is a comparison tool devised by the European Trade Union Institute (ETUI) to measure the level of employee involvement in Member States. It is a composite table that summarises the standard of involvement on three levels (board-level, establishment level and collective bargaining) and formal rights.⁶⁶⁹ The EPI 2.0 is calculated as: $EPI\ 2.0 = (\text{workplace representation} + (\text{board representation} / 2) + ((\text{collective bargaining coverage} + \text{trade union density}) / 2) / 3$

⁶⁶⁸ Member States like Czech Republic, Denmark, Slovakia, Slovenia and Sweden have a low minimum workforce threshold from 25-50 employees for the regulations to apply. Member States like Austria, Finland, Germany, Hungary and Netherland have a medium threshold from 50-500 employees. Member States like Spain, Germany and Luxembourg have higher thresholds from >500 employees. However, some Member States like Austria (PLC) and Luxembourg (private-sector) do not have any minimum workforce threshold.

⁶⁶⁹ European Participation Index (*worker-participation.eu*) <<http://www.worker-participation.eu/About-WP/European-Participation-Index-EPI>> accessed 11 August 2016.

The latest EPI 2.0 is represented in the table below:

<i>Member State</i>	<i>Workplace representation</i>	<i>Board representation</i>	<i>Collective bargaining coverage</i>	<i>Trade union density</i>	<i>EPI 2.0</i>
Austria	0.21	2	0.98	0.35	0.63
Belgium	0.53	0	0.96	0.55	0.43
Bulgaria	0.35	0	0.25	0.20	0.19
Cyprus	0.37	0	0.75	0.70	0.37
Czech Republic	0.18	2	0.44	0.22	0.50
Denmark	0.68	2	0.80	0.80	0.83
Estonia	0.52	0	0.25	0.11	0.23
Finland	0.6	2	0.90	0.74	0.81
France	0.5	1	0.93	0.08	0.50
Germany	0.41	2	0.64	0.22	0.61
Greece	0.04	1	0.85	0.30	0.37
Hungary	0.26	2	0.25	0.17	0.49
Ireland	0.29	1	0.35	0.35	0.38
Italy	0.37	0	0.80	0.34	0.31
Latvia	0.35	0	0.20	0.16	0.18
Lithuania	0.21	0	0.10	0.14	0.11
Luxembourg	0.52	2	0.60	0.46	0.68
Malta	0.14	1	0.56	0.59	0.41
Netherlands	0.45	2	0.89	0.22	0.67
Poland	0.35	1	0.35	0.16	0.37
Portugal	0.05	1	0.94	0.15	0.37
Romania	0.52	0	0.30	0.30	0.27
Slovakia	0.43	2	0.35	0.30	0.59
Slovenia	0.42	2	0.96	0.44	0.71
Spain	0.52	1	0.82	0.16	0.50
Sweden	0.63	2	0.90	0.78	0.82
United Kingdom	0.17	0	0.34	0.28	0.16

Table 13- European Participation Index 2.0⁶⁷⁰

In addition, the European Company Survey in 2009 found that employee representation in Denmark is the strongest in the EU, with 68% of companies having some structure of representation.⁶⁷¹ European Company Survey data also reveal that the dual form of representation is the principal form of formal representation, with 40% of companies having both a trade union and a works council. 20% of companies have only trade unions as a single representative form and 8% of companies are represented via a single-channel works council. Strong employee representation rights in Denmark have been attributed to the following factors:

⁶⁷⁰ Ibid.

⁶⁷¹ Aumayr et al., 'Employee Representation at Establishment Level in Europe: European Company Survey 2009' (*European Foundation for the Improvement of Living and Working Conditions*, 2011) <http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1143en.pdf> accessed 1 September 2016.

(i) Trade union and collective bargaining agreements:⁶⁷²

Denmark has well founded collective bargaining coverage and trade union density. Collective bargaining agreements are covered in 80% of workplaces and 67% of the entire workforce has trade union membership.⁶⁷³

Denmark's established custom of cooperation between employers and employees has guaranteed that trade unions are included in industrial relations throughout the company level. Employers are obligated to have a dialogue with trade unions. A company with five or more employees is entitled to elect a trade union representative and for every fifty employees, there is one trade union representative. The public sector has 99% trade union representation, and the private sector has 78% representation. Even companies with fewer than 20 employees have 57% representation in total.

Finland and Belgium are the two other Member States where trade unions are prevalent in smaller companies, as the only representation system within a company.⁶⁷⁴ In the rest of the EU, trade unions as the solitary bodies for representation are found mainly in bigger companies covering a significantly larger number of employees.⁶⁷⁵ This can be explained partly by the prevalence of dual-channel representation in these companies and partly by the presence of trade unions as key brokers even where works councils are bodies of single-channel representation.⁶⁷⁶

The extensiveness of collective bargaining in Denmark is much bigger when compared to the UK. Collective bargaining in Denmark covers pensions, notice periods, holidays, working-time agreements, and health and safety. The minimum

⁶⁷² Duffy et al., 'Working Together: A Vision for Industrial Democracy in a Common Weal Economy' (Jimmy Reid Foundation, 2013) <<http://reidfoundation.org/wp-content/uploads/2013/12/IndustrialDemocracy.pdf>> accessed 13 August 2016.

⁶⁷³ L Fulton, 'Denmark: Trade Unions' (*worker-participation.eu*) <<http://www.worker-participation.eu/National-Industrial-Relations/Countries/Denmark>> accessed 18 September 2016.

⁶⁷⁴ Aumayr et al., 'Employee Representation at Establishment Level in Europe: European Company Survey 2009' (*European Foundation for the Improvement of Living and Working Conditions*, 2011) <http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1143en.pdf> accessed 1 September 2016.

⁶⁷⁵ Ibid.

⁶⁷⁶ Ibid.

requirements for these are defined under Danish employment law, which also includes the minimum requirements for employer-employee agreements.

(ii) Co-operation committees:⁶⁷⁷

The co-operation committees in Denmark (equivalent to works councils in other Member States) facilitate routine industrial relations and are made up of a proportionate number of employee and management representatives. Shop stewards have automatic membership. The trade union representatives in the companies are given priority on the committee membership, before other elected employees are considered. The management representatives consist of board members and supervisory staff. Unlike many works councils, the co-operation committees are denied a veto over management decisions despite having consultation rights.⁶⁷⁸

(iii) Board-level employee representation:⁶⁷⁹

Since the 1987 amendments to the *Act No. 370 of June 13, 1973 on public limited companies*⁶⁸⁰ and *Act No. 371 of June 13, 1973 on private limited companies*⁶⁸¹ (see, *Table 11- Board-level employee representation provisions and their scope in Member States*), employees may 'demand'⁶⁸² to elect a minimum of two employee representatives,⁶⁸³ and up to one-third of the board in companies (both public-sector and private-sector) with >35 employees. Small companies are governed by the board of directors and bigger companies are governed by the dualistic governance structure. The board has the authority to veto decisions in both cases. Board-level employee representatives share the same power and responsibilities as the other board members. They are involved in the management board's appointment and

⁶⁷⁷ Duffy et al., 'Working Together: A Vision for Industrial Democracy in a Common Weal Economy' (Jimmy Reid Foundation, 2013) <<http://reidfoundation.org/wp-content/uploads/2013/12/IndustrialDemocracy.pdf>> accessed 13 August 2016.

⁶⁷⁸ Aumayr et al., 'Employee Representation at Establishment Level in Europe: European Company Survey 2009' (European Foundation for the Improvement of Living and Working Conditions, 2011) <http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1143en.pdf> accessed 1 September 2016.

⁶⁷⁹ Commission, 'Employee Representatives in an Enlarged Europe: Volume 1' COM (2008), 163-164.

⁶⁸⁰ *Lov nr. 370 fra 13. juni 1973 om aktieselskaber.*

⁶⁸¹ *Lov nr. 371 af 13. juni 1973 om anpartsselskaber.*

⁶⁸² As this is not a mandatory provision, this demand needs to be triggered by at least one-tenth of employees or one or many trade unions representing at least one-tenth of employees at company level.

⁶⁸³ Three employee representatives in the parent company.

directly discharge decision-making on the board. It has been reported that 80% of board-level employee representatives were content with the exchange of information and with their influence on the board.⁶⁸⁴

With Danish culture already enshrining such strong board-level employee representation rights, the ECS was readily welcomed. Denmark was the first Member State to transpose the SE Directive⁶⁸⁵ on 26 April 2004 and the SE Regulation⁶⁸⁶ on 6 May 2004 into national law, with positive consensus from the unions and companies. It is interesting to note that until 15 April 2009, there were only two SEs registered in Denmark. The ‘Study on the operation and the impacts of the Statute for a European Company (SE)’ characterise Denmark:

*“...by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a medium-high level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Denmark has tended to reduce its overall attractiveness. As regards the intra Member State analysis, Denmark stand out with one of the highest level of attractiveness of the SE compared to the domestic public limited-liability company.”*⁶⁸⁷

The minimal number of SEs in Denmark at that time may have been due to the complexity of the procedures in creating an SE than compared with the national public limited-liability company. Maybe companies were simply sceptical about the SE model and uncertain about its viability.

Notwithstanding this, the Danish legislator adopted a flexible position on the SE Directive’s transposition in two respects. First, Danish law allows a company’s

⁶⁸⁴ Commission, ‘Employee Representatives in an Enlarged Europe: Volume 1’ COM (2008), 163-164.

⁶⁸⁵ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294/22.

⁶⁸⁶ Council Regulation (EC) 2157/2001 8 October 2001 on the Statute for a European company (SE) [2001] OJ L294.

⁶⁸⁷ ‘Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482’ (Ernst & Young, 2008)
<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf>
accessed 17 September 2016.

administrative office that is outside the EU to be involved in establishing an SE (only if the said company is established under Danish law, has its registered office in Denmark and has an actual and constant link with Danish economy). Secondly, there is no requirement for the SE's head office and registered office to be in the same place.⁶⁸⁸ Further, the possibility to opt between a one-tier and two-tier governance structure, and the option to unrestrictedly transfer its registered office, have added to the SE being an attractive company form in Denmark. Subsequently, the number of SEs registered in Denmark rose to 292 (as of 21 March 2014) despite any special tax or legal provisions to promote SEs. Denmark is now the Member State with the second highest number of registered SEs after the Czech Republic.⁶⁸⁹

Denmark was also the first Member State to extend board-level employee representation rights to its companies functioning in other countries,⁶⁹⁰ which allows employees of subsidiary companies to vote and possibly have board representation, pending agreement of the shareholders' general meeting.⁶⁹¹

Denmark provides an important example of a cooperative approach to industrial relations that has been widely successful. This may be the reason that 55% of all the registered companies in Denmark have board-level employee representation.⁶⁹²

Denmark's trade union and collective bargaining agreements further

*“proves that high-levels of trade union density and collective bargaining coverage can reduce industrial conflict and increase productivity if it is built on a co-operative industrial relations culture and legislative framework”.*⁶⁹³

⁶⁸⁸ Ibid.

⁶⁸⁹ '2125 European Companies (SEs), Registered in 25 Countries' (*worker-participation.eu*) <http://www.worker-participation.eu/var/ezwebin_site/storage/images/media/images/folie0321/97028-1-eng-GB/Folie03.png> accessed 13 August 2016.

⁶⁹⁰ Per the *Danish Company Act 2010*.

⁶⁹¹ A Conchon, 'Board-Level Employee Representation Rights in Europe: Facts and Trends' (*European Trade Union Institute*, 2011) <https://www.etuc.org/IMG/pdf/2011_ETUI_Report__Board_level_employee_representation_rights_in_Europe.pdf> accessed 14 August 2016.

⁶⁹² A Conchon, 'Board-Level Employee Representation Rights in Europe: Facts and Trends' (*European Trade Union Institute*, 2011) <https://www.etuc.org/IMG/pdf/2011_ETUI_Report__Board_level_employee_representation_rights_in_Europe.pdf> accessed 14 August 2016.

⁶⁹³ Duffy et al., 'Working Together: A Vision for Industrial Democracy in a Common Weal Economy' (*Jimmy Reid Foundation*, 2013) <<http://reidfoundation.org/wp-content/uploads/2013/12/IndustrialDemocracy.pdf>> accessed 13 August 2016.

6.3.2 Case study: Poland

Poland is one of the latest nations to have joined the EU⁶⁹⁴ and is considered as Europe's economic success story. It was the only Member State to have avoided the 2008 financial crisis and continues to grow economically.⁶⁹⁵ It ranks sixth of the EU's strongest market economies and is the leading economy in Central and Eastern Europe.⁶⁹⁶ Board-level employee representation in Poland is lawfully mandated in public sector companies and in 'commercialised companies' (post-public companies).⁶⁹⁷ Commercialised companies are companies that are formed through conversion of a public enterprise into a limited liability company or joint-stock company.⁶⁹⁸ Since 1989, changes in the Polish political system led to economic changes that, in turn, generated major changes in board-level employee representation. Employees were granted rights to organise into independent trade unions. In privatised companies, *The Act of August 30, 1996 on the commercialisation and privatisation of state enterprises*⁶⁹⁹ (see, *Table 11- Board-level employee representation provisions and their scope in Member States*), provided employees with the right to elect 30% of a company's supervisory board members and one member of its board of directors. This was possibly done to win employees' support for their company's privatisation; in reality, the new management often eliminates employees' board-level representation rights after companies have been taken over. Companies frequently introduced parallel changes following ownership transfer, which would result in provisions overriding any board-level employee representation rights.⁷⁰⁰

⁶⁹⁴ Poland became a member of the EU on 1 May 2004.

⁶⁹⁵ 'Doubts Raised over Poland's Success Story' *FT* (6 May 2016) <<http://www.ft.com/cms/s/3/e5bc9c00-12c6-11e6-91da-096d89bd2173.html#axzz4K9U1283N>> accessed 26 August 2016.

⁶⁹⁶ 'Polish Economy - Invest in Poland' (*Emerging Europe*) <<http://emerging-europe.com/regional-opportunities/poland/polish-economy-invest-gdp-growth/>> accessed 29 August 2016.

⁶⁹⁷ D Skupień, 'The Statute for a European Company and the Polish Model of Employees' Involvement' (*University of Lodz*) <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiD9bHgjsDPAhWBcRQKHSZCAu4QFggeMAA&url=http%3A%2F%2Fwww.fmb.unimore.it%2Fon-line%2Fhome%2Feventi%2Fconvegni-in-ricordo-di-marco-biagi%2Fdocumento8374.html&usg=AFQjCNFJeSP7mcJwQwd6xlwojB8F4rfQDw&sig2=4Wzq3a1Qcl oKYmB_xRZjIA> accessed 4 September 2016.

⁶⁹⁸ Ibid.

⁶⁹⁹ *Ustawa z dnia 30 sierpnia 1966 r. o komercjalizacji i prywatyzacji przedsiębiorstw państwowych.*

⁷⁰⁰ 'Worker Board-Level Representation in the New EU Member States: Country Reports on the National Systems and Practices' (*Social Development Agency and European Trade Union Institute for Research Education and Health and Safety*, 2005) <<http://www.worker->

Poland has various arrangements of employee representation and employees can be represented in the following ways:

(i) Trade unions:⁷⁰¹

Trade unions are usually set up in ex private-sector companies (transport, energy and retail sectors). A trade union can be recognised if it has a membership of ten or more. A trade union organisation at the level of a company can be established if the founding members work in the same company; however, an intra-company trade union can be established if those members work for two or more companies. Polish trade unions are mostly influential at company level and their coverage includes monitoring compliance with Polish Labour Law, determining regulations at company level (for example, wage and work regulations, and collective labour agreements) and individual labour issues. One distinct feature of Polish unions is that they lack the authority to nominate board-level representatives, as only employees themselves have this power.⁷⁰² It has also been suggested that the Polish trade union structure is 'fairly decentralised',⁷⁰³ and only 12% of employees acknowledge being affiliated to trade unions, despite Poland's strong trade union tradition.⁷⁰⁴

(ii) Works councils:⁷⁰⁵

A Polish works council is an established consultative organisation made up of employee representatives. It can be established in companies with 50 employees or more. Interestingly, these works councils can be established only by big trade union organisations. Works councils are associated with the unions in single-channel representation and are effectively an extension of trade unions. Works council members are selected by employees in the absence of trade unions at establishment

participation.eu/content/download/4280/58922/file/PRESENS_reports_BLR_in_NMS_readyforprint_final.pdf> accessed 29 September 2016.

⁷⁰¹ Ibid.

⁷⁰² Save for 'welfare pacts' (an agreement as a result of direct negotiation with the management) that allow the unions to nominate supervisory boards representatives.

⁷⁰³ N Kluge and M Stollt, 'The European Company- Prospects for Worker Board-Level Participation in the Enlarged EU' (*Social Development Agency and European Trade Union Institute for Research Education and Health and Safety*, 2006)

<<https://www.etui.org/content/download/2604/29038/file/booklet2006.pdf>> accessed 14 September 2016.

⁷⁰⁴ 'Employee Representation and Information, Consultation and Co-Determination Rights in Europe' (*Practical Law*, 1 November 2015) <<http://uk.practicallaw.com/9-503-2690?q=&qp=&qo=&qe=>>> accessed 18 August 2016.

⁷⁰⁵ Commission, 'Employee Representatives in an Enlarged Europe: Volume 2' COM (2008), 115.

level; thus, an independent works council exists besides trade unions. Despite being independent, Polish works council functions are limited to information and consultation.

(iii) Ad hoc representatives:⁷⁰⁶

Employees may elect employee representatives on an ad hoc basis if no trade unions are recognised by a company. These employee representatives are primarily consulted on working hours, group dismissals, health and safety issues, social fund regulations and temporary deferral of the application of a few labour law provisions.

Very little statistical data exists to quantify the benefits of board-level employee representation in Poland. Krzysztof Jasek's Practitioner Report has led many new companies to consider the positive aspects of employee involvement.⁷⁰⁷ He gives an example of Famed SA, which was a potentially bankrupt company whose workforce steeply declined from 1000 to 400 in four years. Owing to the 'enormous determination' of Famed SA employees, the company transformed into an employee-owned company (almost 50% of its shares) in 1998, collectively with an external investor. Subsequently, employees were instrumental in decision-making. The trade unions obtained representation rights on the supervisory board in the privatisation negotiations. Further, the external investor also chose employees as his board representatives as it was felt that the employees had a profound involvement in company affairs and their perception of business practices was invaluable. Thus, five out of six members on the board were employees. The company's agenda for the board meeting was more than just discussing strategy and included production and sales, costs and predicted profits, and salaries. The rationale behind this was to provide board members with wide-ranging knowledge of the company, enabling them to contribute to development planning. This example of Famed SA served as a case study for many companies, promoting the principle of employee representatives

⁷⁰⁶ 'Employee Representation and Information, Consultation and Co-Determination Rights in Europe' (*Practical Law*, 1 November 2015) <<http://uk.practicallaw.com/9-503-2690?q=&qp=&qo=&qe=>>> accessed 18 August 2016.

⁷⁰⁷ 'Worker Board-Level Representation in the New EU Member States: Country Reports on the National Systems and Practices' (*Social Development Agency and European Trade Union Institute for Research Education and Health and Safety*, 2005) <http://www.worker-participation.eu/content/download/4280/58922/file/PRESENS_reports_BLR_in_NMS_readyforprint_final.pdf> accessed 29 September 2016.

on the supervisory boards as generating ‘synergies’ and ‘cooperation’ in company operations.⁷⁰⁸

Although the Polish legislator implemented the ECS in less than a year after Poland joined the EU,⁷⁰⁹ the attractiveness of the SE as a legal company form is disappointingly low. The ‘Study on the operation and the impacts of the Statute for a European Company (SE)’ categorise Poland as:

“...a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a medium-low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the SE Regulation, Poland has tended to reduce its overall attractiveness. As regards the intra Member State analysis, Poland is characterised by a medium level of attractiveness of the SE compared to the domestic public limited-liability company.”⁷¹⁰

This characterisation may be somewhat optimistic. Until 15 April 2009 (at the time of the study), there were only 2 SEs registered in Poland; as of 15 July 2014, there are 4 SEs in total registered in Poland (AERFINANCE SE, AmRest Holdings SE, LETUMO SE and MCAA SE).⁷¹¹ This number is low compared with Denmark, which too had only two SEs as of 15 April 2009, and 292 as of 21 March 2014.

It is surprising that, despite being one of the strongest EU economies, Poland has failed to see the economic strength of incorporating an SE. For example, a national public limited-liability company in Poland is unable to transfer its registered head office out of the Member State of its incorporation, but an SE incorporated under Polish legislation can transfer its registered office abroad. Additionally, a national public limited-liability company in Poland fails to provide the option of a monistic

⁷⁰⁸ Ibid.

⁷⁰⁹ 4 March 2005.

⁷¹⁰ ‘Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482’ (Ernst & Young, 2008) <http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 17 September 2016.

⁷¹¹ ‘European Company (SE): Facts & Figures’ (worker-participation.eu) <<http://www.worker-participation.eu/European-Company-SE/Facts-Figures>> accessed 18 September 2016.

corporate governance system, but incorporation as an SE in Poland does provide such an option.⁷¹²

The usual explanations for the lack of interest in opting as an SE include the complexity of procedures in creating an SE compared with national public limited-liability company, and cynicism and inexperience about the viability of an SE (as contrasted with Denmark). Complications of the monistic governance structure, the comparatively high minimum share capital and the difficult application of both EU and domestic provisions in the case of the SE are also potentially deterrent factors.⁷¹³ Another major deterrence is the requirement to establish the SNB to negotiate the method of employee involvement in the SE and to gain assent to the arrangement prior to it being registered in the National Register. A limited liability company and a national joint-stock company in Poland do not impose such requirements.⁷¹⁴

Thus, employee involvement, especially board-level employee representation, in Poland is mostly restricted to public-sector companies. And the future of public-sector companies is seemingly bleak, as privatisation has led to a decline in their number. Consequently, employee representation is being 'eroded'.⁷¹⁵ The SE has not been welcomed in the Polish market and the ICE Directive⁷¹⁶ has been the subject of trade union apprehension: they fear

⁷¹² 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (*Ernst & Young*, 2008)

<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 17 September 2016.

⁷¹³ D Skupień, 'The Statute for a European Company and the Polish Model of Employees' Involvement' (*University of Lodz*)

<http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiD9bHgjsDPAhWBcRQKHSZCAu4QFggeMAA&url=http%3A%2F%2Fwww.fmb.unimore.it%2Fon-line%2Fhome%2Feventi%2Fconvegna-in-ricordo-di-marco-biagi%2Fdocumento8374.html&usg=AFQjCNFJeSP7mcJwQwd6xlwojB8F4rfQDw&sig2=4Wzq3a1Qcl oKYmB_xRZjIA> accessed 4 September 2016.

⁷¹⁴ Ibid.

⁷¹⁵ 'Worker Board-Level Representation in the New EU Member States: Country Reports on the National Systems and Practices' (*Social Development Agency and European Trade Union Institute for Research Education and Health and Safety*, 2005) <http://www.worker-participation.eu/content/download/4280/58922/file/PRESENS_reports_BLR_in_NMS_readyforprint_final.pdf> accessed 29 September 2016.

⁷¹⁶ Council Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L80.

“...losing their monopoly at the workplace and that employers could promote the establishment of “union-free works councils” in order to weaken the position of the trade unions in the company”.⁷¹⁷

6.3.3 Case study: France

France is the third largest economy in the EU and the sixth largest in the world. France’s GDP in 2015 was \$2.42 trillion and just 18% short of the UK’s GDP, which was \$2.85 trillion.⁷¹⁸ The country has always maintained its reputation as one of the most forward-looking and highly-developed nations in the world and French leaders are continually seeking to tie France’s future to the constant development of the EU.⁷¹⁹ Unlike other Member States, employee representation in France has a constitutional basis. The Preamble to the Constitution of 27 October 1946, which is integrated in the present Constitution of 4 October 1958, allows “all workers to take part, through their representatives, in the collective determination of working conditions and in company management.”⁷²⁰ The directions on employee representation in companies and the right to strike has a constitutional basis, as the French Constitution empowers the law to establish labour law’s broad principles.⁷²¹

In general terms, recently privatised public-sector companies in France have board-level employee representatives, but companies in the private-sector can also exercise this option.⁷²² Until very recently, no legislation explicitly required board-level employee representation in companies within the private sector. This echoed France’s robust ‘syndicalist customs that inclined to highlight the commitment in

⁷¹⁷ N Kluge and M Stollt, ‘The European Company- Prospects for Worker Board-Level Participation in the Enlarged EU’ (*Social Development Agency and European Trade Union Institute for Research Education and Health and Safety*, 2006) <<https://www.etui.org/content/download/2604/29038/file/booklet2006.pdf>> accessed 14 September 2016.

⁷¹⁸ B Chu, ‘EU Referendum Result: Has the French Economy Really Overtaken the UK in Size Since Last Night?’ *Independent* (24 June 2016) <<http://www.independent.co.uk/news/business/news/eu-referendum-result-has-the-french-economy-really-overtaken-the-uk-in-size-since-last-night-a7101361.html>> accessed 17 July 2016.

⁷¹⁹ ‘France: French Business Culture’ (passport to trade 2.0) <<http://businessculture.org/western-europe/business-culture-in-france/>> accessed 27 September 2016.

⁷²⁰ S Laulom, ‘System of Employee Representation in Enterprises in France’ in *System of Employee Representation at the Enterprise (The Japan Institute for Labour Policy and Training Comparative Labour Law Seminar*, 2012)

<<http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.11.pdf>> accessed 12 September 2016.

⁷²¹ Commission, ‘Employee Representatives in an Enlarged Europe: Volume 1’ COM (2008), 198-199.

⁷²² The chances of this happening are rare.

various trade unions to the basis of employees' control of industry and employee involvement'.⁷²³ Employee shareholders may also be represented by board-level employee representatives. The number of board-level employee representatives can vary, depending on whether the company is a public-sector or private sector company; the size of the company; and the size of the board. In a public-sector company with more than 1000 employees, one-third of the board is nominated by employees; in a newly privatised company with fewer than 15 board members, employee representatives have three seats.⁷²⁴

The dual channel model of representational participation best describes the employee representation regime in France and can be explained historically. The current system is a product of a gradual accumulation of representative forms that developed at different stages of French industrial relations history.⁷²⁵ Employee representation rights in France are constituted in the following ways:

(i) Trade union (*Délégué syndical*):

After the crisis of May 1968 in France,⁷²⁶ the *Law of December 27, 1968* was passed, which guaranteed for the first time that the unions had an official footing in the workplace. Subsequently, a trade union could create its own bargaining unit in a company if it satisfies the prerequisite to have at least two members. This bargaining unit represents the interests of its members and promotes the activities of the union. Historically, trade unions in France, along with other countries in southern Europe, considered themselves "...vanguard organisations who existed in order to represent workers in struggle...and their aim was to challenge the power and authority of employers and not work in cooperation with them".⁷²⁷ This may explain why, in

⁷²³ N Kluge and M Stollt, 'The European Company- Prospects for Worker Board-Level Participation in the Enlarged EU' (*Social Development Agency and European Trade Union Institute for Research Education and Health and Safety*, 2006) <<https://www.etui.org/content/download/2604/29038/file/booklet2006.pdf>> accessed 14 September 2016.

⁷²⁴ 'France: Country Overview' (*worker-participation.eu*) <<http://www.worker-participation.eu/European-Company-SE/Countries-Transposition/France/COUNTRY-OVERVIEW>> accessed 22 September 2016.

⁷²⁵ S Laulom, 'System of Employee Representation in Enterprises in France' in *System of Employee Representation at the Enterprise (The Japan Institute for Labour Policy and Training Comparative Labour Law Seminar, 2012)* <<http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.11.pdf>> accessed 12 September 2016.

⁷²⁶ The period of civil unrest in France which involved mass protests and strikes in factories and universities across the country.

⁷²⁷ N Kluge and M Stollt, 'The European Company- Prospects for Worker Board-Level Participation in the Enlarged EU' (*Social Development Agency and European Trade Union Institute for Research*

modern times, smaller and medium-sized companies do not have trade unions. They are present, however, in private-sector companies, with membership at 8% of the French workforce. Despite the low figure of union membership, it is an 'established and important institution' in companies where it has retained its presence.⁷²⁸

To improve their image, two of the main French confederations of trade unions – CFE -CGC⁷²⁹ and CGT⁷³⁰ – are seeking to extend employee involvement and generalising board-level employee representation rights, which are presently limited to public-sector and privatised companies.⁷³¹ The French Institute of Board-level Representatives, the IFA (*Institut Français des Administrateurs*),⁷³² along with CFE-CGC and CGT, have argued that public-sector companies should either willingly agree to employee representatives or must explain the reason for their unwillingness.⁷³³ The proposals were considered by the French legislator, but only resulted in procedural modifications in the conduct of labour relations with the passing of the *Law on Labour Relations and Employment 2015*.⁷³⁴ The absence of an overarching approach to board-level employee representation can be explained by the lack of harmonisation on the issue among the French confederations of trade unions, as some unions consider the issue insignificant (e.g. CGT-FO⁷³⁵).⁷³⁶

Education and Health and Safety, 2006)

<<https://www.etui.org/content/download/2604/29038/file/booklet2006.pdf>> accessed 14 September 2016.

⁷²⁸ Ibid.

⁷²⁹ *Confédération française de l'encadrement - Confédération générale des cadres*.

⁷³⁰ *Confédération générale du travail*.

⁷³¹ A Conchon, 'Board-Level Employee Representation Rights in Europe: Facts and Trends'

(*European Trade Union Institute*, 2011)

<https://www.etuc.org/IMG/pdf/2011_ETUI_Report____Board_level_employee_representation_rights_in_Europe.pdf> accessed 14 August 2016.

⁷³² An autonomous association of board-level representatives which aims to influence policy and organises training and seminars.

⁷³³ N Kluge and S Vitols, 'The Crisis: Catalyst for Stronger Worker Participation in Corporate Governance?' Compilation of the country reports provided by the experts of the SEEurope Network, Brussels, 24 and 25 November 2010), 30.

⁷³⁴ *La loi relative au dialogue social et à l'emploi 2015*.

⁷³⁵ *Confédération générale du travail - Force ouvrière*.

⁷³⁶ L Fulton (ed), *The Forgotten Resource: Corporate Governance and Employee Board-Level Representation. The Situation in France, the Netherlands, Sweden and the UK* (Hans-Böckler-Stiftung 2007) 98.

(ii) Individual employee delegation (*Délégués du personnel*):⁷³⁷

Most recently, the *Law on Labour Relations and Employment 2015*⁷³⁸ (mentioned above) extended the prospects of group employee representative bodies within a mutual body called the individual employee delegation. They are organised in companies with 11 or more employees and in companies with fewer than 50 employees. Most of the duties and powers of health and safety committees and works councils are devolved to the individual employee delegation.

(iii) Works councils (*Comité d' Entreprise*):

Works councils (*Comité d' Entreprise*) in France were established by the *ordinance of 22 February 1945*,⁷³⁹ with a view to integrating employees more fully in the management of a company's operations.

The key functions of a French works councils are to guarantee employees' collective expression, and to safeguard employees' interests economically, professionally, culturally and socially. Companies with more than 100 employees were to have a committee that would represent all categories of employees. Owing to low trade union membership, the interests of the entire workforce is represented by the works councils. Nonetheless, unions play an important role in the works council, especially by exercising their exclusive power to nominate candidates for election in the works council in the first ballot.⁷⁴⁰

On the management board and the supervisory board, the rights of a works council representatives are limited and their role is broadly consultative in nature, albeit that they are allowed to express opinions.⁷⁴¹ A works council's negative opinion is immaterial to the employer; their veto rights and enforceability are restricted; and an employer is only obliged to acquire works council consent in minor matters, such as

⁷³⁷ 'Employee Representation and Information, Consultation and Co-Determination Rights in Europe' (*Practical Law*, 1 November 2015) <<http://uk.practicallaw.com/9-503-2690?q=&qp=&qo=&qe=>>> accessed 18 August 2016.

⁷³⁸ *La loi relative au dialogue social et à l'emploi 2015*.

⁷³⁹ This ordinance has frequently been modified and strengthened by many Acts.

⁷⁴⁰ 'Employee Representation and Information, Consultation and Co-Determination Rights in Europe' (*Practical Law*, 1 November 2015) <<http://uk.practicallaw.com/9-503-2690?q=&qp=&qo=&qe=>>> accessed 18 August 2016.

⁷⁴¹ Commission, 'Employee Representatives in an Enlarged Europe: Volume 1' COM (2008), 216.

a company doctor's appointment.⁷⁴² In rare cases, the scope of information and consultation with the works council has extended to human resources issues, social issues and company strategy before the board makes a binding decision.⁷⁴³

(iv) Health and safety committee (*Comité d'Hygiène, de Sécurité, et des conditions de Travail*):⁷⁴⁴

In companies with more than 50 employees, the health and safety committee operates to safeguard employees' health and safety, improving working conditions and preventing professional risks.

(v) Collective bargaining agreements (*Conventions Collectives de Travail*):⁷⁴⁵

The *law of February 11, 1950* generalised collective bargaining in France, thereby establishing the industry as the foremost level for bargaining. The *Aurox reforms of 1982* were introduced to reinforce collective bargaining and employee representation, which enforced an annual obligation to negotiate working time and salary at the company level and a five-yearly obligation to negotiate job arrangements at the industry level. In contrast to other Member States, collective bargaining agreements in France are of substantial significance and it is considered an irony in the French industrial relations system that, despite the low level of union membership (8%), France has a high proportion of collective bargaining coverage (approximately 98%). It is debatable whether such a high coverage simply results from the extension of collective bargaining agreements by the Ministry of Labour. Collective bargaining agreements are mostly legally binding upon employers, regardless of whether the employer was involved in any collective bargaining or was associated with any employers' representative grouping that was party to the

⁷⁴² 'Employee Representation and Information, Consultation and Co-Determination Rights in Europe' (*Practical Law*, 1 November 2015) <<http://uk.practicallaw.com/9-503-2690?q=&qp=&qo=&qe=>> accessed 18 August 2016.

⁷⁴³ Ibid.

⁷⁴⁴ 'France: Health and Safety Representation' (*worker-participation.eu*) <<http://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Health-and-Safety>> accessed 24 September 2016.

⁷⁴⁵ U Rehfeldt, 'The French System of Collective Bargaining' (*Social Europe*, 29 August 2010) <<https://www.socialeurope.eu/2010/08/the-french-system-of-collective-bargaining/>> accessed 26 September 2016.

negotiations.⁷⁴⁶ Even the specialised French Labour Courts usually interpret any disputed collective bargaining agreement provisions in the employees' favour.⁷⁴⁷

The irony extends to the central role that trade unions play in collective bargaining. Only official trade unions are authorised to bargain and sign collective bargaining agreements. This matter had been controversial for a long time, and the *Constitutional law on the Modernisation of the Institutions of the Fifth Republic 2008*⁷⁴⁸ introduced new requirements to ascertain if a union is truly representative and permitted to be involved in collective bargaining at company, industry and national level. It also provided that, in the absence of trade union delegates, staff delegates and works councils can negotiate and sign collective bargaining agreements on some issues. Further, the binding nature of collective bargaining agreements in France is much stronger than in Member States like Greece, Portugal and Germany. For example, if collective bargaining agreements are concluded by the trade unions, then it is firmly binding on the employers.

French law thus separates the functions of two prominent employee representation bodies: trade unions, which engage in collective bargaining and sign collective agreements; and works councils, which primarily operate for information and consultation on limited management decisions. That being said, employee representatives' rights in French corporate governance are extended to monitoring company management. Public-sector companies in France are obligated to have employee directors on either the supervisory board or board of directors. Subject to whether these managerial bodies include private-sector representatives, they can be two- or three-sided. One-third of directors are employee representatives, in comparison with the two-thirds of directors nominated by the shareholders' body.⁷⁴⁹ The monistic system of corporate governance is most prevalent in France, although

⁷⁴⁶ 'French Collective Bargaining Agreements- A Brief Overview' (*Triplet & Associés*) <http://www.triplet.com/50-10_employment/50-50_collective.asp> accessed 26 September 2016.

⁷⁴⁷ Ibid.

⁷⁴⁸ *Loi constitutionnelle de modernisation des institutions de la Ve République 2008*.

⁷⁴⁹ Commission, 'Employee Representatives in an Enlarged Europe: Volume 1' COM (2008), 215-216.

companies have been able to choose between the monistic and dualistic system of corporate governance since 1967.⁷⁵⁰

It has been argued that corporate governance and the employee representation system in France are far from being perfect. Lapôtre's study identifies the shortcomings in French corporate governance.⁷⁵¹ The company boards selected for his study revealed that the directors did not have enough authority to question the President Director General (PDG⁷⁵²), and the most senior manager was independent and powerful with respect to decision-making. On board composition, Lapôtre's study provides evidence that board directors are usually the members of similar social networks as the PDG; to complicate matters further, a high percentage of the members of the board are ex-PDGs or existing PDGs. Additionally, at the Annual General Meeting, PDGs are delegated with 'proxy voting rights' by the absent shareholders. Thus, the PDG usually has the bulk of the votes of those represented at the meeting, and often more than 50% of voting rights. As a result, this senior manager normally selects the directors accountable for his supervision. Monitoring of his behaviour, therefore, is "rarely rigorous". Most board meetings last no longer than three to four hours, which is undoubtedly insufficient time to make strategic decisions or monitor their implementation. Lastly, the code of corporate governance in France backs the appointment of 'independent' directors to deal with homogeneity, but fails to lawfully define 'independent'. Consequently, these directors may not have any genuine interest in the company.

In relation to the employee representation system, the *Constitutional law on the Modernisation of the Institutions of the Fifth Republic 2008*⁷⁵³ has added to its complexity. For example, trade unions representatives and the representatives of the trade union bargaining unit, the works councils, the individual employee delegation

⁷⁵⁰ L Fulton (ed), *The Forgotten Resource: Corporate Governance and Employee Board-Level Representation. The Situation in France, the Netherlands, Sweden and the UK* (Hans-Böckler-Stiftung 2007) 19-20.

⁷⁵¹ M Lapôtre, 'Corporate Governance and Employee Board-Level Representation in France: Executive Summary' in Lionel Fulton (ed), *The Forgotten Resource: Corporate Governance and Employee Board-Level Representation. The Situation in France, the Netherlands, Sweden and the UK* (Hans-Böckler-Stiftung 2007) 95-99.

⁷⁵² *Président Directeur Général*.

⁷⁵³ *Loi constitutionnelle de modernisation des institutions de la Ve République 2008*.

and health and safety committees, all share representative roles in a division of roles which is defined incoherently.⁷⁵⁴ Additionally, Laulom argues that:

*“the low level of unionisation combined with a highly pluralist system certainly reinforces complexity...even if this plurality of representation can lead to some competition, in practice they are more complementary than competitors (even if of course competition is possible among various unions, and the 2008 Acts reinforces electoral competition). When trade unions are present, they will usually play an important coordinating role. When there are no representative trade union in companies, the possibility given to works councils or to staff delegates to negotiate dispensatory agreements could be discussed. Are these representatives independent and competent enough to negotiate agreements which can be less favourable than the law?”*⁷⁵⁵

France is one of the few Member States that implemented the ECS in its domestic law after the proposed deadline.⁷⁵⁶ The ECS presents a new corporate governance system under French law, which explains the insertion of new chapters in both the French Labour Code and Commercial Code, despite the fundamental option already provided under the French corporate governance system to choose between the monistic and dualistic system.⁷⁵⁷

The ‘Study on the operation and the impacts of the Statute for a European Company (SE)’ categorise France:

“...by a medium-high level of attractiveness in respect of national legislation applicable to the SE and by a low level of attractiveness as regards the implementation (or non-implementation) of the options left open by the SE Regulation. When implementing (or not implementing) the options left open by the

⁷⁵⁴ S Laulom, ‘System of Employee Representation in Enterprises in France’ in *System of Employee Representation at the Enterprise (The Japan Institute for Labour Policy and Training Comparative Labour Law Seminar, 2012)* <<http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.11.pdf>> accessed 12 September 2016.

⁷⁵⁵ Ibid.

⁷⁵⁶ A single piece of legislation transposed the ECS to the French legal system on 13 July 2005. The deadline for transposition was 8 October 2004.

⁷⁵⁷ Menjucq et al., ‘The European Company under French Law: Main Features’ (2008) 9 *European Business Organization Law Review* 137.

*SE Regulation, France has tended to reduce its overall attractiveness. As regards the intra Member State analysis, France is characterised by a low level of attractiveness of the SE compared to the domestic public limited-liability company, not taking into consideration the specific incentive provided for the SE as regards the increased freedom in the definition of the statutes.”*⁷⁵⁸

As with Poland, the study’s findings on the attractiveness of SE in France are overly optimistic. At the time of the study, 15 SEs were registered in France, as of 15 April 2009. By 21 March 2014, the number had risen by only eight bringing the total to 23 SEs.⁷⁵⁹

Menjucq et al. note that French legislators took a very ‘conservative’ approach and modelled the French SE on the French SA (*Société Anonyme*)⁷⁶⁰ system, save for applying the complete flexibility extended by the ECS.⁷⁶¹ As the monistic and dualistic system of governance already existed for the SA, no important modifications were necessary under French law. The French SEs are subject to SA rules for management and administration issues and general meetings. French legislators were also ‘conservative’ on labour aspects when implementing the SE Directive and focused on promising employee involvement rights extensively. Still, some independence was provided to redefine the latitude of the prevailing employee representative bodies when entering into collective bargaining.⁷⁶²

If a French SE duplicates a pre-existing SA company form, then theoretically it should be an unanimously popular company form in France. However, a report on ‘The Societas Europaea or SE: The New European Company’ (commissioned by the French Minister of Justice) identified that the SE model in France has a “long way to

⁷⁵⁸ ‘Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482’ (*Ernst & Young*, 2008) <http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 17 September 2016.

⁷⁵⁹ ‘European Company (SE): Facts & Figures’ (*worker-participation.eu*) <<http://www.worker-participation.eu/European-Company-SE/Facts-Figures>> accessed 18 September 2016.

⁷⁶⁰ Public limited liability company.

⁷⁶¹ Menjucq et al., ‘The European Company under French Law: Main Features’ (2008) 9 *European Business Organization Law Review* 146.

⁷⁶² *Ibid.*

go to strengthen its attractiveness”.⁷⁶³ Among the identified negative drivers, inadequate mobility in the SE is widely discussed. Member States like Ireland, the UK and the Netherlands have a system of ‘registered office’ that allows companies to have their headquarters anywhere ‘they see fit’ and independent of their registered location. In contrast, the French system is based on the ‘real seat’ theory, which requires that SEs must have their registered office and central administration “in the same place”.⁷⁶⁴ The impediment placed by the French legislator to allowing a company’s administrative office outside the EU/EEA to participate in an SE’s creation acts as a significant deterrent. Despite being challenged by the EC, the French legislators have held their ground. It is interesting to note that there is no such requirement for the French SA.⁷⁶⁵ Another deterrent to form an SE in France is the set of rules concerning employee involvement and negotiating procedures, especially trade unions’ involvement in the negotiating process (SNB members are selected by the trade unions).⁷⁶⁶

Board-level employee representation in France is an intricate system and the SE has not really taken off as a preferred company structure. The intricacy of the French representation system is arguably linked to the particular capital structure of French companies. In comparison with any other Member States in the EU, French companies “have been dominated both by the influence of the state and the direct control of the banks, who established close and stable relations between management and shareholders to the exclusion of worker interests”.⁷⁶⁷ It is therefore challenging to make board-level employee representation work in both public and private sector companies. Additionally, before the introduction of numerous labour law provisions on employee representation, French Company Law was inclined to

⁷⁶³ N Lenoir, ‘The Societas Europaea or SE: The New European Company’ (*HEC Europe Institute*, July 2007) <<http://www.hec.edu/Media/Files/ENG/Europe-Institute/Documents/Report-SE-N-Lenoir-2007-HEC-Europe-Institute>> accessed 16 September 2016.

⁷⁶⁴ Ibid.

⁷⁶⁵ Ibid.

⁷⁶⁶ ‘Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482’ (*Ernst & Young*, 2008) <http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 17 September 2016.

⁷⁶⁷ N Kluge and M Stollt, ‘The European Company- Prospects for Worker Board-Level Participation in the Enlarged EU’ (*Social Development Agency and European Trade Union Institute for Research Education and Health and Safety*, 2006) <<https://www.etui.org/content/download/2604/29038/file/booklet2006.pdf>> accessed 14 September 2016.

encourage monistic rather than dualistic governance.⁷⁶⁸ Since the crisis of May 1968, employee involvement and representation were reflected in French Labour Law (see, *Table 11- Board-level employee representation provisions and their scope in Member States*).

As well as being intricate, the French position on employee representation is ambiguous. For instance, French legislators tried to revise the representation system in public-sector companies by passing the *Act 83-675 on the democratisation of the public sector 1983*⁷⁶⁹. This allows employees to elect their board-level employee representatives in public-sector companies. It was completely unanticipated that this would be received unfavourably by companies, and, only three years later, public-sector companies declined significantly.⁷⁷⁰ However, French legislators were committed to empower employees with board-level employee representation rights and they passed the *Edict 86-1135 modifying Act 66-537 on commercial companies 1986*⁷⁷¹, which provided that private-sector companies may have employee representatives (elected by the workforce) securing one-third of the board by a way of the articles of association. Similarly, for privatised companies, *Act 94-640 on enhancing employees' participation in the company 1994*⁷⁷² was passed, which provided that up to three members of the board are employee representatives (elected by the workforce) by a way of statement in the articles of association.

6.4 Conclusion

This chapter analysed the variation in attitude on board-level employee representation across the EU. A significant ambiguity of board-level employee representation classification whether under company law or labour law of different Member States was discussed in detail, thereby confirming the complication among company actors and other third-party stakeholders in accepting board-level employee representation provisions. Since company law and labour law are two

⁷⁶⁸ Ibid.

⁷⁶⁹ *Loi 83-675 de Democratization du secteur public 1983*.

⁷⁷⁰ N Kluge and M Stollt, 'The European Company- Prospects for Worker Board-Level Participation in the Enlarged EU' (*Social Development Agency and European Trade Union Institute for Research Education and Health and Safety*, 2006) <<https://www.etui.org/content/download/2604/29038/file/booklet2006.pdf>> accessed 14 September 2016.

⁷⁷¹ *Ordonnance 86-1135 modifiant la loi 66-537 sur les sociétés commerciales 1986*.

⁷⁷² *Loi 94-640 relative a l'amelioration de la participation des salaries dans l'entreprise 1994*.

different schools of thought for legal scholarship, political reality and regulatory policy, therefore, it has been difficult to harmonise EU laws on employee representation like the ECS, as it is interpreted variably.

The analysis in this chapter has laid the foundation for future quantitative studies on the issue of board-level employee representation across the Member States. Comparative research in the future can also benefit from the data gathered and the discussions on the issue.

In the context of an SE, the comparison and exploration of the ambiguity in board-level employee representation and also its classification supports the notion of achieving an uniform system of board-level employee representation in the form of an SE. Member States like Belgium, Bulgaria, Cyprus, Estonia, Italy, Latvia, Lithuania, Malta, Romania and the UK, which do not legislate on board-level employee representation may find inspiration in the added benefits of board-level employee representation in their corporate governance structure to achieve the EU's social objectives.

The case studies of Member States in this chapter and the last two chapters provided a comprehensive outlook on the distinctiveness of board-level employee representation in the EU.

Denmark demonstrated a more accepting nature to employee representation, whether it be in the context of an SE or at the national level. Being the Member State with the highest EPI employee representation rate and with the second highest number of registered SEs, the Danish economy is the topmost in terms of many social indicators of progress.⁷⁷³ This explains why the Danish approach of extending board-level employee representation rights of its national companies to subsidiaries in other countries was adopted by Norway and Sweden.⁷⁷⁴

⁷⁷³ Duffy et al., 'Working Together- A Vision for Industrial Democracy in a Common Weal Economy' (Jimmy Reid Foundation, 2013) <<http://reidfoundation.org/wp-content/uploads/2013/12/IndustrialDemocracy.pdf>> accessed 13 March 2018.

⁷⁷⁴ A Conchon, 'Board-Level Employee Representation Rights in Europe: Facts and Trends' (European Trade Union Institute, 2011) <https://www.etuc.org/IMG/pdf/2011_ETUI_Report___Board_level_employee_representation_rights_in_Europe.pdf> accessed 19 March 2018.

Despite various arrangements of employee involvement in Poland and being Europe's economic success story, Poland seemed less attractive to the idea of an SE. The absence of good empirical data to quantify the benefits of board-level employee representation in Poland and its strong monistic corporate governance structure makes it difficult to argue the SE's attractiveness in the Polish industrial relations system. Additionally, Poland was identified as one of the Member States which found the SE overly complicated in incorporation procedures in comparison with its national public limited-liability companies.

The analysis in this chapter also dismissed the findings of the 'Study on the operation and the impacts of the Statute for a European Company (SE)', which were overly optimistic in categorising both Poland and France "...by a *medium-high level of attractiveness in respect of national legislation applicable to the SE*".

The French position on board-level employee representation provided a very interesting case study. This was mainly because despite employee representation having a constitutional basis in France and the numerous laws on employee involvement,⁷⁷⁵ the French position is far from simple on this. *Act 83-675 on the democratisation of the public sector 1983*⁷⁷⁶ legislated board-level employee representation in public-sector companies and within three years of its implementation there was a huge decline in public-sector companies in France. This directly suggested that empowering employee rights made the public-sector companies unacceptable as a company form by various stakeholders and the company's management. Additionally, the French system dissuades trade unions and because of the division into number of competing confederations contending for union membership, the French confederations of trade unions are the least influential in the EU. The works councils (*Comité d' Entreprise*) do have extensive consultative capacity, but cannot impact any substantial decision-making. Further, the discussion on the findings of Lapôtre's study demonstrated the complexities in French corporate governance articulately. For example, the autocratic tradition in relation to the directors and the PDGs, the selection of directors, the duration of board meetings

⁷⁷⁵ See, Table 11- Board-level employee representation provisions and their scope in Member States.

⁷⁷⁶ *Loi 83-675 de Democratization du secteur public 1983.*

and the absence of the legal definition of 'independent directors' which results in having directors who have no genuine interest in the company due to their independent nature.

Against this background, the SE seems a rational choice to unify board-level employee representation and facilitating the expansion of businesses across the Member States. A board that does not represent the interests of the employees directly by its employees is counter-productive.

CHAPTER 7- REVIEWING THE EUROPEAN COMPANY STATUTE

7.1 Introduction

The advent of the SE has received mixed responses within Member States. It proved successful in some and unpopular in others. Because it took more than 40 years to become realised in legislation, the idea of a 'European Company' is the result of multiple compromises between the Member States. One might expect that legislators have now had ample time and practical experience of the SE to identify the shortcomings that make it unpopular and inhibit its establishment in Member States. These shortcomings directly conflict with the SE's goal of achieving a single EU market and to resolve the challenges of globalised markets. It was optimistically supposed that this new form of company would eradicate the complications arising from the unequal treatment of companies by national legislation in Member States, make cross-border restructuring easier for corporations and facilitate uniform procedures.⁷⁷⁷ However, issues like insolvency, tax and labour were left to the discretion of the Member States, causing much uncertainty and making it impossible to use the new legal entity for reincorporation or cross-border mergers.⁷⁷⁸

This chapter builds on the previously discussed shortcomings of the ECS, focusing on a possible review of the ECS by addressing its shortcomings and identifying the challenges of harmonising companies in future across Member States.

The EC is obliged under the SE Regulation to consider whether any amendments are needed to the ECS. In 2011, the EC initiated a major consultation⁷⁷⁹ on the review of the SE Directive and also commissioned a 'Study on the operation and the impacts of the Statute for a European Company (SE)',⁷⁸⁰. After this consultation,

⁷⁷⁷ For example, the SE's formation and structure.

⁷⁷⁸ JA McCahery and EPM Vermeulen, 'Does the European Company Prevent the 'Delaware Effect'?' (2005) TILEC Discussion Paper 2005-010, 2
<<http://papers.ssrn.com/sol3/papers.cfm?abstractid=693421>> accessed 18 December 2016.

⁷⁷⁹ Commission, 'Consultation document. First phase consultation of Social Partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees' C (2011) 4707.

⁷⁸⁰ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (*Ernst & Young*, 2008)

which was a mere procedural requirement, the EC communicated that ‘it was quite early on to make a complete evaluation of the SE Directive’.⁷⁸¹ The ‘Study on the operation and the impacts of the Statute for a European Company (SE)’ raised interesting issues, and the EC initiated another consultation on the results of this study.⁷⁸² This, however, received many varied responses, and stakeholders like the ETUC dismissed its key findings, saying, for example, that it presented employee involvement “as a key negative driver without making it clear that this thesis was based on a perception by a group of potentially biased interviewees and not on the legal reality”.⁷⁸³ Following this consultation, the 2012 Action Plan on EU Company Law and Governance contained no recommendations to revise the ECS.⁷⁸⁴ The only positive impact of these consultations was the launch of:

“an information campaign to increase awareness of the European Company (SE) Statute through a comprehensive website⁷⁸⁵ bringing together practical advice and relevant documents on the Statute.”⁷⁸⁶

In fact, the SE website⁷⁸⁷ is no more than a basic information section on the SE that lacks an SE database⁷⁸⁸.

<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 11 December 2016.

⁷⁸¹ Commission, ‘Communication from the Commission on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees’ COM (2008) 591.

⁷⁸² Commission, ‘Consultation on the Results of the Study on the Operation and the Impacts of the Statute for a European Company (SE)’ COM (2010a).

⁷⁸³ ‘ETUC reply to the Commission consultation of Social Partners under Article 154 TFEU on enhancing EU cooperation in the prevention and deterrence of undeclared work’ (*European Trade Union Confederation*)

<https://www.etuc.org/IMG/pdf/ETUC_draft_reply_to_the_Commission_consultation_on_undeclared_work.pdf> accessed 19 December 2016.

⁷⁸⁴ Commission, ‘Communication from the commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies’ COM (2012) 0740.

⁷⁸⁵ SE Webpage <http://ec.europa.eu/internal_market/company/societas-europaea/index_en.htm> accessed 12 December 2016.

⁷⁸⁶ Commission, ‘Communication from the commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies’ COM (2012) 0740.

⁷⁸⁷ SE Webpage <http://ec.europa.eu/internal_market/company/societas-europaea/index_en.htm> accessed 12 December 2016.

⁷⁸⁸ Much needed information for research purposes.

The small number of established SEs so far indicate that the ECS has not been the triumph that was foreseen before it came into force.⁷⁸⁹

In their commentary on the EC's Consultation on the Results of the Study on the Operation and the Impacts of the Statute for a European Company, Accountancy Europe state that 'SE endeavours the possibility of business operations on a sincerely EU basis and is promising enough in meeting the objectives of the integrated single market'⁷⁹⁰ but scholars like Enriques argue that the ECS is an additional set of optional rules introducing a new legal entity governed partially by the ECS itself and partly by national corporate laws.⁷⁹¹ For example, the SE Regulation lays out the existing regulations for European limited liability companies and indicates that there are no laws for this type of company apart from the laws of a particular Member State. Similarly, the SE Directive makes no assertion of any substantial rules that must be followed regarding employee involvement in limited liability companies, but rather leaves the matter to the discretion of Member States.

7.2 Introducing 'Employee Dispute Resolution' (EDR) to the negotiation process

When an SE is created, the SE Directive necessitates negotiations with an employee representative body to agree on the way that employee involvement will be organised.

Employee involvement negotiations could have one or more of the following outcomes: (i) an SE will not be required to provide for employee involvement where no company involved in the establishment of an SE is regulated by employee involvement policies prior to the establishment of the SE; (ii) the 'standard set of rules' will apply if an SE is established by setting up a subsidiary or a holding company or by merger;⁷⁹² (iii) the employee negotiating body may withdraw from existing negotiations and depend for the provision of employee information and

⁷⁸⁹ 'FEE Comment Letter on the European Commission Consultation on the Results of the Study on the Operation and the Impacts of the Statute for a European Company (SE)' (*Accountancy Europe*, 2010) <<https://www.accountancyeurope.eu/consultation-response/fee-comment-letter-on-the-european-commission-consultation-on-the-results-of-the-study-on-the-operation-and-the-impacts-of-the-statute-for-a-european-company-se/>> accessed 19 January 2017.

⁷⁹⁰ Ibid

⁷⁹¹ L Enriques, 'EC Company Law Directives And Regulations: How Trivial Are They?' (2006) 27 (1) *University of Pennsylvania Journal of International Law* 31.

⁷⁹² On the condition that appropriate employee count was involved in the relevant companies.

consultation on a Member State's existing rules; (iv) prevailing employee involvement rules in a Member State will continue to apply where a national company is transformed into an SE; (v) management and employees can agree on the form of provision for employee involvement; (vi) an agreement; and (vii) if the time frame⁷⁹³ for negotiations end without a mutually acceptable arrangement, then the 'standard set of rules'⁷⁹⁴ will apply.⁷⁹⁵

A 'standard set' of rules will allow employees' interests to affect an SE's significant decisions, because they give employees the right to appoint, elect, oppose or propose some members of the supervisory/administrative body in the SE and every employee representative will have the same rights as the members who represent shareholders. These rules may seem a little generic and is a major deterrent in the UK, if not so much in Germany. Management bodies of UK companies are highly unlikely to initiate an extensive consultation exercise with their employees and will not threaten employee relations by dismissing their opinion on information, consultation and involvement.

EU legislators designed the SE in a way that harmonised only marginal elements of company law. They delegated employee involvement to an additional negotiation procedure. It was assumed that this would instigate EU-wide cross-border regulatory competition or that businesses would opt for the SE over other company forms to evade compulsory codetermination obligations. The linking of employee involvement in the SE decisions provided under the ECS has in fact made it a very contentious problem.

Two key issues identified in the 'Study on the operation and the impacts of the Statute for a European Company (SE)' make the negotiation procedure less attractive and effective.⁷⁹⁶

⁷⁹³ 6-12 months, as agreed by the parties.

⁷⁹⁴ Annex to the SE Directive.

⁷⁹⁵ The particular nature of which depends on the structure for employee involvement in the relevant companies prior to the establishment of the SE.

⁷⁹⁶ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (*Ernst & Young*, 2008)
<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf>
accessed 11 December 2016.

(i) Representatives of the trade union in the SNB:

It is hard to understand why research concluded that the presence of trade union representatives in the SNB⁷⁹⁷ should be a 'negative driver' in setting up an SE. On the contrary, since a company's management employs the expertise of law firms in establishing SEs, it is only fair that employees use the experience of trade union representatives for negotiations. Doing so would put the negotiating parties on an almost equal footing, and create a smoother and more informed negotiation process. Dr. Hendrik Höhfeld (Syndikus, MAN Diesel SE) reported in the 'Die Societas Europaea (SE)' seminar⁷⁹⁸ that, during the negotiation process of MAN Diesel SE, the presence of trade union representatives on the SNB was productive and he saw nothing to discourage trade union involvement. It appears that apprehension in companies towards trade union involvement is driven by cultural norms in Member States. Such norms have been a constant barrier to industrial relations in the past.

(ii) Complicated, costly and lengthy negotiations:

SE procedures are onerous in Member States where employee involvement is not a norm in companies. Research has identified that in Member States like Austria, Belgium, Bulgaria, Cyprus, France, Greece, Hungary, Italy, Lithuania, Luxembourg, Netherlands, Poland and UK, the guidelines on employee involvement in setting up an SE are far more complicated than the guidelines for establishing national public limited companies.⁷⁹⁹ The time frame for negotiations is almost never adhered to, suggesting that they are overly complicated and time consuming.⁸⁰⁰ Adhering to the time frame is imperative: the stock market may judge that, if a company's management and employees are not in agreement, then the company's productivity will be limited, detrimentally affecting the company's stock value.⁸⁰¹ Negotiations

⁷⁹⁷ See, Recital 19 of the SE Directive.

⁷⁹⁸ 'Die Societas Europaea (SE) - Dokumentation der Seminare, vom 30. März 2006 und vom 24. April 2007' (DEUTSCHES AKTIENINSTITUT, 2007)

<https://www.dai.de/files/dai_usercontent/dokumente/studien/2007-10-01%20Die%20Societas%20Europaea.pdf> accessed 11 January 2017.

⁷⁹⁹ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (Ernst & Young, 2008)

<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 11 December 2016.

⁸⁰⁰ Ibid.

⁸⁰¹ The companies can avoid a lengthy and complicated negotiation procedure by also simply being vigilant and committed to the company's welfare. For example, BASF SE had assessed this risk and created 'BASF Europe Works Council', where both the employees' representatives and the management were committed to adhere to the negotiations timeframe to avoid market speculations.

may be complicated further by the lack of information about the SE available to negotiating parties. Language issues may also arise, because the transposition laws of a particular Member State are usually accessible only in the national language.

EuroCommerce adds to the argument that the negotiation procedure is hampered by an absence of regulatory certainty.⁸⁰² EuroCommerce, in its capacity as a European social partner, made the same recommendation to the EC to simplify the SE Directive on establishing and operating an SE.

To mitigate such issues, a resolution model like 'Employee Dispute Resolution' (EDR) should be adopted under the SE Directive. EDR can embody reliable and efficient methods of settling disputes related to the negotiation procedure, and can be far faster in achieving consensual resolution than the 'standard set' of rules. EDR can be a stand-alone procedure regulated by an independent body and the process can be initiated either by the employee representatives' body or by the supervisory body of a prospective SE.

EDR can operate as either an independent or a mandatory scheme. Independent schemes can be undertaken by the management and the employees' representatives when the SE establishment procedure is initiated, or once it is certain that the negotiations will end without agreement or within the time frame. Independent schemes use experts or other third parties to assist during the negotiations procedure.⁸⁰³ Mandatory schemes can be applied as a condition when the SE procedure is initiated. Mandatory conditions may include membership of a designated regulated sector to the membership terms of which the company must adhere (e.g. ombudsmen).

Parties can be made aware of EDR by attending an 'information conference' before SE administrative procedural formalities commence.⁸⁰⁴ Neither the management nor

⁸⁰² '1st phase consultation art.144 TFEU on the possible review of Directive 2001/86/EC' (eurocommerce, 2011) <https://www.eurocommerce.eu/media/7275/position-empl-consultation_european_company-20.09.2011.pdf> accessed 28 March 2018.

⁸⁰³ For example, in recent decades, UK chartered accountants have been carrying out of businesses and shares.

⁸⁰⁴ This concept is based on UK model of family mediation, where the parties are required to attend a mediation information session prior to litigation.

the employees would be obligated to accept EDR, but the 'information conference' will help smooth the process of employee involvement negotiations and improve their outcomes.

7.2.1 The proposed mechanics of EDR

The EC could achieve EDR by launching an 'EDR Pledge'.⁸⁰⁵ It is proposed that the design of a 'pledge' to employ EDR within an SE would be a very progressive step and will ensure the smooth running of negotiations. There should be extensive encouragement for prospective SE organisations and companies to welcome the pledge, which will demand a genuine commitment and not just a token arrangement.

Communications from the EC, the EC's SE website and the ETUI website can periodically cover EDR techniques and EDR schemes in their information contents. Other promotion methods could include magazine and journal articles, email correspondence to the member base, conferences, and presentations. The member base could organise meetings with senior managers of key European companies that are yet sceptical to adopt SE as their form of company.

To ensure effectiveness in encouraging negotiating parties to comply with EDR and EDR decisions, ECS can include a provision to impose costs sanctions on negotiating parties if they are unreasonable⁸⁰⁶ in resolving a dispute. For example, an EDR Pledge Report⁸⁰⁷ can be published quarterly that would recognise difficulties that negotiating parties might encounter and show how they could be resolved through the use of EDR. Research has shown that uptake of a service or a facility is maximised when its efficacy is publicised.

The binding nature of EDR decisions should depend upon the fact that if the negotiating parties entered into the scheme voluntarily like in 'independent schemes'.

⁸⁰⁵ Similar to 'Alternative Dispute Resolution' (ADR) Pledge launched by the UK government in 2001. The rationale was the inclusion of ADR clause in procurement contracts of almost all government branches and to use ADR whenever feasible in government disputes. There has been speculation that the government anticipates reinitiating that pledge and to include organisations and businesses with it.

⁸⁰⁶ The question of reasonableness in this context can be made objective (not discussed for the purpose of this research).

⁸⁰⁷ Similar to annual UK ADR Pledge report.

For ‘mandatory schemes’, where some ombudsmen make a decision there could be an appeal process to safeguard that resolutions made are not unreasonable to either party.

EDR schemes should be financed directly by the prospective SE companies, if not by the EC or trade organisations. Such funding will ensure that the scheme is run cost effectively and competently and will mitigate the costs of individual companies in contributing to mitigate their individual need to contribute funds.

7.3 Failure to deal with insolvency provisions

Insolvency, liquidation and winding-up of SEs are areas of law that have been left to the discretion of Member States. These are important issues that require employee involvement, both for information and for consultation. The problem is particularly acute where there is uncertainty in a Member State on these issues.

The UK is a case in point. Insolvency practitioners in this country face an issue involving the ‘conditions to consult’ prior to making redundancies (per s.188 of the Trade Union & Labour Relations (Consolidation) Act 1992). Companies have an obligation to consult with employees when intending to make twenty or more of the workforce redundant. Redundancies should not be initiated until after 30-45 days after the consultation has commenced.⁸⁰⁸ The UK has in place many recognised ‘special circumstances’ that mitigate a company’s obligation to consult with employees, but insolvency falls outside that scope. The UK Secretary of State is also to be notified of a company’s intention to make redundancies (45 days prior to first dismissals if more than 100 employees are involved, and 30 days prior to first dismissals if between 20 and 99 employees are involved).⁸⁰⁹ National legislation⁸¹⁰ fails, however, to adequately resolve four issues that thwart notification and consultation in insolvency situations.

(i) The ‘sham’ consultation:

Unlike the consultation procedure defined in the ICE Directive, the Trade Union & Labour Relations (Consolidation) Act 1992 does not provide for meaningful

⁸⁰⁸ Section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992.

⁸⁰⁹ Section 193 of the Trade Union & Labour Relations (Consolidation) Act 1992.

⁸¹⁰ Trade Union & Labour Relations (Consolidation) Act 1992.

employee consultation that would avoid dismissals, lessen the consequences of redundancies or reduce the number of employees initially intended to be made redundant.

In *GMB and Others v Susie Radin Ltd*,⁸¹¹ the Court of Appeal did make an effort to stress the requirement for meaningful consultation with employees and adopted tests to substantiate this: to consult with representatives when plans are still at a decisive period; satisfactory information that forms a foundation for the employee representatives to prepare a response; sufficient response time; and a careful consideration by the company of the response.

In practice, however, in the cut and thrust of insolvency, it is almost impossible to achieve meaningful consultation with employees except in the case of a proposal for a long-term reorganisation.

(ii) The ineptitude to fund ongoing business:

Where a company is near insolvency proceedings, the company will be unable to employ the entire workforce and sustain the ongoing costs of business during the consultation period.

(iii) The requirement to consult carries the risk of confidential information being leaked during insolvency proceedings, thereby potentially diminishing the company's value.

(iv) Incompatibility with insolvency law:

The period of 45 days prior to first dismissals is inconsistent with the time frame of 14 days given to administrators to decide which contracts of employment, if any, should be adopted under the Insolvency Act 1986. The significance of adopting an employment contract is that the salary of employees becomes an administration cost that is to be paid as a priority over other creditors.⁸¹² The capital available to other creditors will therefore be unreasonably reduced, if the adoption of contracts of employment merely results from the obligation to consult. By law, contracts are automatically terminated in a compulsory liquidation. In a voluntary liquidation, the

⁸¹¹ [2004] EWCA Civ 180.

⁸¹² See, para. 99, Schedule B1 of the Insolvency Act 1986.

company must terminate running its business except for, as prescribed for its beneficial winding up (s.87 of the Insolvency Act 1986). Section 214(3) of the Insolvency Act 1986 provides that if a director is certain of a foreseeable liquidation, then the director must action:

“every step with a view to minimising the potential loss to the company’s creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken.”

If insolvency is practically inevitable, the directors will rarely carry on the normal course of business just to facilitate employee consultation, because doing so would render them personally liable for misfeasance and/or wrongful trading.

As a way of recommendation, The ECS should include a provision to distinguish clearly between redundancies in insolvent and solvent situations. EU legislators, in partnership with stakeholders like INSOL Europe, should be encouraged to devise a more comprehensive test to be able to perceive definite conditions and contemplate a practically achievable level of consultation. Doing so will make the SE a more attractive form of company.

Reforming the terms for managing insolvency will also reduce costs to national governments. This issue is EU-wide, although the scale of the problem has not yet been accurately assessed, as only cases at a significant level are reported. In Germany, for example, during the preliminary period in insolvency, the earnings are funded from the public purse. Employment Tribunals in UK carry on distributing protective awards even though a company may be insolvent,⁸¹³ and the government is obliged to meet such costs or lessen the return to other unsecured creditors. This reform will result in a significant decline in the costs to the state (for example, National Insurance in the UK), as the scale of protective awards will decrease.

The rationale for addressing the shortcomings on collective redundancies information and consultation obligations under the Trade Union & Labour Relations

⁸¹³ *AEI Cables Ltd v GMB & Ors* UKEAT/0375/12/LA.

(Consolidation) Act 1992 within the context of the SE is to provide a working model on these aspects that can be adopted in the ECS. This will ensure that SE has an effective insolvency provisions features that are not necessarily addressed by the laws of individual Member States, thereby making it more comprehensive and a popular choice of a company form.

7.4 The need to include tax provisions

The ECS is regarded as ‘fiscally neutral’. It does not create a beneficial tax regime because tax provisions⁸¹⁴ have been left to the discretion of Member States.⁸¹⁵ In accordance with a Member State’s fiscal legislation, applicable at branch level or company level, an SE is taxed like any other multinational corporation where its administrative office is located.⁸¹⁶

Researchers and others are agreed that this situation has led to disharmony across the EU with respect to SE being an adoptive form of company⁸¹⁷ and a major deterrent for companies to opt for SE across the EU, despite the EC’s proposals to legislate on this matter.⁸¹⁸ Frits Bolkestein (EC Commissioner responsible for Internal Market and Taxation) writes:

“I concede that work remains to be done in some areas: in particular, I refer to the taxation aspects, which, quite rightly, are of concern to potential users⁸¹⁹ ... This leaves the SE-Statute without any tax rules. This is a rather unfortunate situation, which I regret very much. Clearly, the lack of appropriate tax rules significantly reduces the practical attractiveness of the European Company Statute. Business representatives emphasize this quite forcefully.”⁸²⁰

⁸¹⁴ These include all types of taxes (for example, capital gains tax, income tax, taxation of all types of transfers and taxation of substance).

⁸¹⁵ Recital 20 of the SE Regulation.

⁸¹⁶ See, Article 10 of the SE Regulation.

⁸¹⁷ M Gommie, ‘EU Taxation and the Societas Europaea – Harmless Creature of Trojan Horse?’ (2004) 44 Eur. Taxation 35-36.

⁸¹⁸ ‘The European Company – Frequently Asked Questions’ (European Commission, 2004) <http://europa.eu/rapid/press-release_MEMO-04-235_en.htm?locale=en> accessed 19 February 2017.

⁸¹⁹ F Bolkestein, ‘The New European Company: Opportunity in Diversity’ in J Rickford (ed), *The European Company, Developing a Community Law of Corporations* (Intersentia 2003) 41.

⁸²⁰ F Bolkestein, ‘The new European Company: opportunity in diversity’ (Address to Conference at the University of Leiden, Leiden, 29th November 2002).

Having a separate tax regime for the SE may be a persuasive incentive for companies to adopt the SE. There were attempts to legislate SE tax arrangements in 1970, 1975, 1989 and 1991, which contained suggestions for tax provisions regarding the determination of an SE's tax residence, tax provisions relating to the establishment of a holding SE, the conditions for allowing cross-border transfers of an SE's tax residence without tax penalties and a system to balance losses of foreign 'Permanent Establishments' from the SE's national profits in its registered Member State.⁸²¹ However, Member States have continuously refused to surrender their independence in tax matters even before and after the ECS came into force.⁸²² The only progress that has so far been made was in the Council Directive No 2005/19/EC,⁸²³ which contained a tax treatment arrangement of an SE's corporate seat cross-border transfer from one Member State to another, and dependent on specific legal structure. Further, Kirshner states that "protectionism kept the European Member States from attaining consensus on a harmonized tax regime for the SE companies".⁸²⁴ For example, Member States with relatively low corporate tax rates worry about losing their competitive advantage (12.5% in Ireland⁸²⁵ and no tax on retained incomes in Estonia⁸²⁶).

It is hard to understand why taxation rules should be left to the Member State where the SE is registered. The European Court of Justice has found multiple violations of tax treatment of European companies with respect to fundamental freedoms in varying EU cross-border circumstances. In Case C-311/97 *Royal Bank of Scotland*,⁸²⁷ there were instances where a reduced tax liability was refused to non-

⁸²¹ N Kluge and M Stollt, 'The European Company- Prospects for Worker Board-Level Participation in the Enlarged EU' (*Social Development Agency and European Trade Union Institute for Research Education and Health and Safety*, 2006)

<<https://www.etui.org/content/download/2604/29038/file/booklet2006.pdf>> accessed 14 January 2017.

⁸²² R Aitken and C Morgan, 'Societas Europaea: Is Tax an Incentive or a Barrier?' (2004) 15 *European Business Law Review* 1343, 1347.

⁸²³ Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States [2005] OJ L58/19: this is no longer in force.

⁸²⁴ J Kirshner, 'A Third Way: Regional Restructuring and the *Societas Europaea*' (2010) 7 (3)

European Company and Financial Law Review 454.

⁸²⁵ 'Corporation Tax' (*Revenue: Irish Tax and Customs*) <<https://www.revenue.ie/en/companies-and-charities/corporation-tax-for-companies/corporation-tax/index.aspx>> accessed 22 February 2018.

⁸²⁶ A Lundeen, 'Estonia has the Most Competitive Tax System in the OECD' (Tax Foundation) <<https://taxfoundation.org/estonia-has-most-competitive-tax-system-oecd/>> accessed 19 February 2017

⁸²⁷ [1999] ECR I-2651.

domiciled companies. In Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen*,⁸²⁸ the ECJ identified the denial of exemptions in income tax where dividends are remunerated by non-domiciled company.⁸²⁹ In Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt*,⁸³⁰ the ECJ acknowledged that slim capitalisation laws were applied only to non-domiciled shareholders and their associates. Overseas permanent companies were subject to unfavourable tax treatment for the reasons of: (i) their shareholdings in other Member States (Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt*⁸³¹); (ii) cost deduction of the domestic head office level (Case C-141/99 *AMID v Belgische Staat*⁸³²); (iii) stamp duty rates of credit arrangements closed in other Member States (Case C-439/97 *Sandoz GmbH v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland*⁸³³); and (iv) lessees leasing company assets from non-domiciled lesser (Case C-294/97 *Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna*⁸³⁴).

Further, one Member State refused tax credit on dividend to non-domiciled companies (Case 270/83 *Commission v France (Avoir Fiscal)*⁸³⁵) and rejected acknowledgement of carrying tax losses forward if accounts were retained in another Member State (Case C-250/94 *Futura Participations SA and Singer v Administration des contributions*⁸³⁶).

The ECS cannot be revised in the area of tax provision unless Member States give up the 'fiscally neutral' concept of an SE. A survey conducted by the Accountancy Europe revealed that 62% of Member States favoured applying domestic tax rates and domestic collection systems to incomes calculated via a common base system

⁸²⁸ [2000] ECR I-4071.

⁸²⁹ See also, M Lang, 'Direct Taxation: Is the ECJ Heading in a New Direction?' (2006) <<https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/staff/publications/langetibfd2006s421ff.pdf>> accessed 22 February 2017.

⁸³⁰ [2002] ECR I-11779.

⁸³¹ [1999] ECR I-6161.

⁸³² [2000] ECR I-11619.

⁸³³ [1999] ECR I-7041.

⁸³⁴ [1999] ECR I-7447.

⁸³⁵ [1986] ECR 273.

⁸³⁶ [1997] ECR I-2471.

and believed that no different tax system was essential for SE.⁸³⁷ No Member States prefer a European tax scheme centrally operated with tax revenues allotted to Member States,⁸³⁸ despite a decade of work by the EU to implement a European corporate tax rules mechanism.⁸³⁹ The EC needs to propose supplementary tax provision in the ECS so that the SE would not be subjected to second-grade tax treatment, thereby making it more lucrative for companies to opt for the SE as a company form in the EU.

7.5 Specific recommendations to the ECS

It is evident from the analysis presented in *Chapter 3- Evaluation of the Functioning of the European Company Statute*, and the issues raised in this chapter, that the ECS impedes the progress of the SE as a company form. The EC needs to take into account the issues raised in previous consultations and the 'Study on the operation and the impacts of the Statute for a European Company (SE)' to revise the SE Directive.

The provisions in the ECS regarding employee information and consultation are ambiguous, because they differ from the provisions in the EWC Directive and the ICE Directive. For example, the procedure to establish a SNB to consult on employee involvement arrangements is lengthy and still largely unfamiliar for many businesses. Additionally, the application of 'standard rules' was considered to be restricting the extent of a voluntary method of employee involvement negotiations, as the 'standard rules' apply the maximum level of employee involvement in companies intending to establish themselves as an SE. In certain instances, it was likely that a majority of employees may be compelled by a minority to accept an employee involvement model that they did not want.

⁸³⁷ 'FEE Position Paper on Tax Treatment of the European Company (Societas Europaea)' (*Accountancy Europe*, 2003) <https://www.accountancyeurope.eu/wp-content/uploads/PP_Tax_Treatment_of_the_European_Company_03111532005181230.pdf> accessed 15 February 2017.

⁸³⁸ Only Denmark and Sweden were receptive to the idea to see a Home State Taxation scheme where the entire revenue of the group is calculated under the tax law of the Member State where the SE is registered and then allotted under a formula basis to respective Member States of operations.

⁸³⁹ 'EU wants universal corporate tax rules' (*RT*, 26 October 2016) <<https://www.rt.com/business/364187-new-eu-corporate-tax-system/>> accessed 12 February 2017.

The ambiguity of Article 66 of the SE Regulation, which involves conversion to a public limited liability company from an SE, will incur higher legal fees for the companies concerned, which would require more technical and professional support. The issue of ‘no decision on conversion into a public limited-liability company should be taken until the two-year period has elapsed since its registration or before the first two sets of annual accounts have been approved’ is too lengthy and should either be removed or shortened.⁸⁴⁰

The SE could in fact be used to withdraw greater employee involvement rights if two merging companies with reduced employee involvement provisions intend to establish an SE in a Member State that has higher national employee involvement rights.⁸⁴¹ Similarly, a company with higher employee involvement rights will lose those rights if an SE is formed by being taken over by a company with zero or minimum employee involvement provisions. Presently, the only resolution to this potential abuse of SE is the success of the negotiation procedure.

Article 4, General Provisions, Title I of the SE Regulation provides that the minimum subscribed capital should be €120,000. This subscribed capital may not be a deterrent issue for large corporations; however, it is a major deterrent for medium-sized companies that are looking to expand their business across other Member States. It is therefore suggested that this subscribed capital should be revised as follows:

<i>Number of employees in a company</i>	<i>Proposed subscribed capital</i>
>2000	€120,000
≥500 – 2000	€60,000
<500	€30,000

Table 14- Suggested subscribed capital

This proposed scale would ensure fairness of the minimum subscribed capital requirement depending upon a company’s workforce and simultaneously make the SE an attractive company form at Member State level.

⁸⁴⁰ Article 66 (1) of the SE Regulation.

⁸⁴¹ As previously mentioned in *Chapter 3 Evaluation of the Functioning of the European Company Statute*.

The EC reported that many responses were submitted regarding the possible amendments to the way an SE is formed (procedures and conditions).⁸⁴² One such amendment was to provide flexibility in the conditions of formation of an SE by conversion. The creation of an SE by conversion is specifically restricted to public limited-liability companies. The ‘Study on the operation and the impacts of the Statute for a European Company (SE)’ found that many private limited-liability companies have converted into an SE, initially by primarily converting into a public limited-liability company.⁸⁴³ It was previously proposed and is reiterated in this research that a revision could be made to Article 4, General Provisions, Title I of the SE Regulation, permitting a private limited-liability company to be converted into an SE and providing security to shareholders and third party interests.

Further, one aspect of formation that has been left untouched is ex nihilo formation of an SE. Individuals cannot form an SE, and national companies intending to form an SE must be able to show that their business or operation has a cross-European aspect.⁸⁴⁴ This is said to be a considerable barrier, especially when an individual or company does not presently operate across Europe but intends to do so by forming an SE. Therefore, providing such flexibility to individuals and businesses could further increase the popularity of the SE as a form of company across the EU.

Article 7, General Provisions, Title I of the SE Regulation provide the option for Member States to have an SE’s head office and registered office in the same Member State. More than one-third of Member States have exercised this option. The UK is one of the Member States that did not agree with the option. The ETUI firmly believes that this option ‘should be maintained’, the rationale being that, since more than one third of Member States have exercised this option, some consensus on the issue has been achieved, and that removing this option will lead to potential

⁸⁴² ‘Review of European Company Statute – Frequently Asked Questions’ (*European Commission*, 2010) <http://europa.eu/rapid/press-release_MEMO-10-97_en.htm?locale=en> accessed 11 April 2017.

⁸⁴³ ‘Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482’ (*Ernst & Young*, 2008) <http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 11 December 2016.

⁸⁴⁴ Similarly, the option of transforming into an SE, where the company concerned ought to have had a subsidiary for a minimum of two years, which is subject to other Member State’s legislation.

abuse of SE by ‘tax hopping’ and circumventing employee involvement rights.⁸⁴⁵ Nonetheless, removing this provision will make the SE as flexible with respect to freedom of establishment as some public limited-liability companies in several Member States.⁸⁴⁶

The issue of confidentiality is not provided for under the SE Regulation, but vaguely and minimally stated in the SE Directive. Paragraph 13 of the Preamble in the SE Directive provides that:

“...the confidentiality of sensitive information should be preserved even after the expiry of the employees’ representatives terms of office and provision should be made to allow the competent organ of the SE to withhold information which would seriously harm, if subject to public disclosure, the functioning of the SE”.

Employee representatives on an SNB or other representative body have an obligation to respect the confidentiality of information or other crucial aspects of the negotiation procedure; but this obligation is towards the ‘competent organ’ of the SE and when this obligation is breached, it is this ‘competent organ’ that can bring action. Several company laws in Member States, especially in the UK, do not recognise obligations owed by any interested parties to the managerial board as an entity, given that the directors are agents for the company or effectively act as one. It is therefore proposed that, if the employees’ obligations were owed to the companies intending to form an SE itself, rather the ‘competent organ’, and if any breach of confidentiality were pursued on the company’s behalf by the ‘competent organ’ or the managerial board, the SE Directive would be more in line with the company law of such Member States. Furthermore, there should be specific rules listing the consequences of any breach, depending on its severity (for example, dismissal of employment, financial penalties, or criminal charges, if necessary), as presently the directive gives no clarity on such consequences.⁸⁴⁷

⁸⁴⁵ ETUI Reply to EU Consultation (2010) <<https://www.worker-participation.eu/European-Company-SE/Review-2010-13/ETUI-Reply-to-EU-Consultation>> accessed 19 April 2016.

⁸⁴⁶ This would need further technical consultation to ensure the rights of creditors, employees and other third parties are safeguarded.

⁸⁴⁷ The other reference to confidentiality is provided under Article 8 (4), Miscellaneous Provisions, Section III of the SE Directive.

The ECS has not dealt with the establishment costs of SE. Creating an SE involves paying variously high fees and administrative costs, depending on the formation method, the company size and the Member State where it intends to be registered. The EC should initiate proposals to remove establishment cost barriers

Reviewing and amending the ECS will not be sufficient to make the SE an effective company form. The potential and benefits of the model must be successfully communicated. The current literature, communications from the EC and other initiatives either by the EC or trade unions, fail to advertise and communicate the benefits of adopting an SE or the complete mechanism of an SE to the relevant businesses and stakeholders.

As well as reviewing the ECS, the SE Regulation should be simplified. Employee involvement is not the key factor when businesses consider becoming an SE and other driving factors include an efficient and flexible management provided under SE and the trans-European dimension to their business. The SE Regulation should be revised to make cross-border requirements clearer. References to the national legislation of a Member State where an SE is registered should be minimised, as should the options given to Member States on various aspects of adopting the SE Regulation. As previously mentioned, given the large proximity of references to the laws of Member States, the SE can be considered to have 28 different forms rather than one single 'European Company'. This makes the uniformity of SE ambiguous and less attractive.

7.6 Case Study: The Czech Republic (an SE haven)

The Czech Republic is an important case study because the SE is more prevalent here than in any other Member State. Out of 2,757 registered SEs across the EU, 1,898 are in the Czech Republic alone.⁸⁴⁸ This data is extremely perplexing: the Czech Republic has no historical background of employee representation and the Czech Republic contributes merely 1.2% of the total EU GDP, which is

⁸⁴⁸ Figures correct as 31 March 2017. See, 'SE Companies: Facts and Figures 2017' (*SEEurope*, March 2017) <<http://www.worker-participation.eu/European-Company-SE/Facts-Figures>> accessed 18 April 2017.

approximately 20 times less than that of Germany.⁸⁴⁹ It is hard to understand why such a small economy should find the SE so popular, when the model has a target audience of big organisations with substantial cross-border activities. The analysis of this high prevalence of SEs in the Czech Republic can serve as a guide to other Member States and types of company, which may help to suggest ways of making the SE a more popular form of company in other Member States.

The Czech Republic has an extremely advanced industrial base, which has been attracting foreign investment for some time. Extensive foreign investments have been focused on the pharmaceutical, engineering, automotive and chemical industries, which have been the main drivers in the Czech Republic's economic transformation. The Czech Republic retains a stable economic and social policy and is frequently mentioned as one of the most prosperous new EU economies.⁸⁵⁰ The tax regime in the Czech Republic is also an incentive to attract businesses: the country offers a tax-relief system to large-scale investors, a low tax rate of 5% on the default profits of investment funds and various other governmental investment inducements.⁸⁵¹ Unlike many other Member States, Czech Company Law provides for unions and some employees to have appointment rights to the board of directors.⁸⁵²

The motivations to establish SEs has been investigated before,⁸⁵³ but in the context of SEs in Czech Republic the research is fairly limited. Ernst & Young's 'Study on the operation and the impacts of the Statute for a European Company (SE)'⁸⁵⁴ made a

⁸⁴⁹ 'Share of Member States in EU GDP' (*European Commission Eurostat*, 2016) <<http://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20170410-1>> accessed 21 April 2017.

⁸⁵⁰ 'Doing Business in the Czech Republic' (*Noerr*, 2016) <https://www.noerr.com/~media/Noerr/PressAndPublications/Brochures/Doing%20Businss%20Guide%20in%20the%20Czech%20Republic_May%202016.pdf> accessed 23 April 2016.

⁸⁵¹ Ibid.

⁸⁵² Botero et al., 'The Regulation of Labor' (2004) 119 (4) *Quarterly Journal of Economics* 1349.

⁸⁵³ The motivation to establish the SE include and is not limited to: (i) many businesses use SE to circumvent board-level employee representation rights; (ii) the lack of tax provisions in the ECS is another factor that drive businesses to establish the SE at tax favourable Member State; and (iii) circumventing the dualistic board structure imposed on national companies by opting for a monistic board structure in an SE.

⁸⁵⁴ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (*Ernst & Young*, 2008) <http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 21 April 2016.

comparative analysis of the SEs across the EU, but the empirical data in this study is unhelpful. Ernst & Young conducted only 60 interviews in total across the EU by sending out an online questionnaire to current SEs; the number of interviews or responses from the SEs in the Czech Republic is unknown, but Ernst & Young's study did provide fairly detailed country-specific information. The reasons offered for establishing an SE signified only the general advantages of the model, and not why the Czech Republic was a more popular SE haven than any other Member State.

For example, Ernst & Young's study on Czech Republic concluded that one of the positive drivers for setting up an SE in the Czech Republic was corporate governance, as a one-tier structure can be chosen and the size of the board can be reduced to a bare minimum of one member on the supervisory board and one on the management.⁸⁵⁵ Neither of these possibilities is available to Czech public companies.

“Czech company law regarding public limited-liability companies only provides for the two-tier system...The rules applicable to the SE, as regards in particular its organisation and management, are generally seen as more attractive than those applicable to the Czech public limited-liability companies. The possibility of having a board of directors and a supervisory board each with only one member is perceived as the main driver for having an SE instead of a national public limited liability company, which must have at least three members on its board of directors / a one member in the case of a sole shareholder, and at least three members on its supervisory board.”⁸⁵⁶

However, this conclusion is ambiguous if not entirely incorrect. First, less than 10% of the 1,898 SEs registered in Czech Republic have opted for a one-tier corporate governance system (according to the Czech Commercial Register).⁸⁵⁷ Secondly, s.194(3) Act n° 513/1991 Coll., Commercial Code 1991⁸⁵⁸ provides for an exception

⁸⁵⁵ Ibid.

⁸⁵⁶ Ibid.

⁸⁵⁷ ‘Business registers in Member States - Czech Republic’ (EUROPEAN JUSTICE, April 2017) <https://e-justice.europa.eu/content_business_registers_in_member_states-106-cz-en.do?member=1> accessed 19 April 2017.

⁸⁵⁸ Zakon č. 513/1991 Sb., obchodní zákoník 1991.

for companies with single shareholders in terms of board size, as they are permitted to have a single member on the board of directors.

In their study, Ernst & Young made a general statement that the attractiveness of forming an SE can also be attributed to tax considerations.⁸⁵⁹ In relation to the Czech Republic, this again is an obscure deduction: the taxation provisions of an SE are decided by the Member State where an SE is registered, and an SE in the Czech Republic is taxed at a relatively high rate of 19% corporation tax.⁸⁶⁰ Other Member States have much lower rates of corporation tax: for example, Cyprus is taxed at 12.5%, Latvia and Lithuania both at 15%.⁸⁶¹ Despite having such low tax rates the number of SEs registered in Cyprus is only 24 and Latvia and Lithuania both have fewer than 10 SEs in total.⁸⁶²

It might be argued that the flexibility of Czech Company Law explains the rise of the SE as a popular company model in the country. But Slovakia, a neighbouring Member State with relatively identical company law provisions, has only 123 registered SEs.⁸⁶³ The two countries share the same Commercial Code: (i) Act n° 111/1990 of 19 April 1990 on state enterprise 1990⁸⁶⁴; and (ii) Act n° 513/1991 Coll., Commercial Code 1991⁸⁶⁵ (see, *Table 11- Board-level employee representation provisions and their scope in Member States*). For example, as with Czech Company Law, Slovakia's Company Law also provides for public limited-liability companies for the dualistic corporate governance system, the possibility that the board of directors

⁸⁵⁹ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (*Ernst & Young*, 2008) <http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 19 April 2017.

⁸⁶⁰ 'Corporate tax rates table' (*KPMG*, 2017) <<https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html>> accessed 25 April 2017.

⁸⁶¹ *Ibid.*

⁸⁶² Figures correct as 31 March 2017. See, 'SE Companies: Facts and Figures 2017' (*SEEurope*, March 2017) <<http://www.worker-participation.eu/European-Company-SE/Facts-Figures>> accessed 24 April 2017.

⁸⁶³ Figures correct as 31 March 2017. See, 'SE Companies: Facts and Figures 2017' (*SEEurope*, March 2017) <<http://www.worker-participation.eu/European-Company-SE/Facts-Figures>> accessed 28 April 2017.

⁸⁶⁴ Zakon č. 111/1990 z 19. aprila 1990 o štatnom podniku 1990.

⁸⁶⁵ Zakon č. 513/1991 Sb., obchodni zakonik 1991.

can have a single member and the minimum of three members on the supervisory board (s.200(1) Act n° 513/1991 Coll., Commercial Code 1991).⁸⁶⁶

Eidenmüller and Lasák conducted an empirical study to ascertain the motivations of Czech SE founders and used the data from Czech national Commercial Register on all SEs registered in the Czech Republic.⁸⁶⁷ In the last quarter of 2010, they gathered data from 40% of all the SEs registered in the Czech Republic. Their principal findings which drove the motivation to establish an SE were interesting in comparison with other Member States.⁸⁶⁸

First, the European image of the SE was quite attractive rather than a limited liability company (Společnost s ručením omezeným / s.r.o.) or a joint stock company (Akciová společnost / a.s.). Their survey provided 82 positive responses from the registered SE's in the Czech Republic out of the 88 on the image of the SE.⁸⁶⁹

Second, the easy internal governance system offered by the SE is quite a preference and this “does not necessarily concern the availability of the one-tier board system, but rather the reduction of management board members and of members of the supervisory board”.⁸⁷⁰

Third, the regulatory procedures of setting up an SE in the Czech Republic are favourable, for example, an SE can be registered within 10 working days in the Czech Republic.⁸⁷¹

Fourth, the choice to move a company's registered office to another Member State and cross-border mergers were also revealed to drive the incorporation of the SEs in

⁸⁶⁶ Ibid.

⁸⁶⁷ H Eidenmüller and J Lasák, 'The Czech Societas Europaea Puzzle' (2012) 12 (2) The Journal of Corporate Law Studies 237-254.

⁸⁶⁸ Ibid at 242-248.

⁸⁶⁹ Ibid at 242.

⁸⁷⁰ Ibid at 248.

⁸⁷¹ '2017 Company Formation Czech Republic' (accace, 2017) <<https://accace.com/wp-content/uploads/2017/03/2017-Company-Formation-Czech-Republic-EN.pdf>> accessed 25 April 2017.

Czech Republic (52 incorporations stated this as their motivation between September and November 2010).⁸⁷²

Eidenmüller and Lasák also reported that the ‘financing scheme’ in the Czech Republic is “another state-specific advantage for SE users”.⁸⁷³ Most of the SEs incorporation in the Czech Republic are facilitated by professional service providers.⁸⁷⁴ These professional service providers in combination with the country’s minimal regulatory burden makes it very easy for prospective businesses to set-up an SE. Professional service providers and other significant providers of credit sell Czech SEs to potential buyers by lending them the minimum share capital required for the formation of an SE at a 0% interest rate.⁸⁷⁵ This practice is apparently very common in the Czech Republic, thereby removing the problem of finding €120,000 minimum capital from small or medium-sized companies which was identified as significant deterrent to set up an SE (previously discussed in *Section 3.3 The efficiency of the SE Directive*).

It is also interesting to discover that adopting or circumventing employee representation has no significance whatsoever in the incorporation of the SEs in the Czech Republic. ‘Survey Results 3’ in Eidenmüller and Lasák’s study shows that out of 88 positive responses to denote the most central motives for setting up an SE, only one related to employee participation.⁸⁷⁶ When companies have fewer than five employees, the question of employee representation becomes more or less irrelevant.

Compared to other international companies limited by shares, the SEs in Czech Republic benefits from free cross-border business operations and VAT refunds.⁸⁷⁷ Also, there has been no indication either in Eidenmüller and Lasák’s study or

⁸⁷² H Eidenmüller and J Lasák, ‘The Czech Societas Europaea Puzzle’ (2012) 12 (2) The Journal of Corporate Law Studies 244.

⁸⁷³ Ibid at 248.

⁸⁷⁴ For example, Leucosya Consulting, Healy Consultants, Euro Company Formations, Accace Czech Republic and Interstatus.

⁸⁷⁵ H Eidenmüller and J Lasák, ‘The Czech Societas Europaea Puzzle’ (2012) 12 (2) The Journal of Corporate Law Studies 250.

⁸⁷⁶ Ibid at 246.

⁸⁷⁷ ‘General Jurisdiction Information’ (*INTERSTATUS*)

<<https://www.interstatus.com/jurisdictions/jurisdictions-with-low-tax-rates/czech-republic/>> accessed 25 April 2017.

otherwise, that the Czech Republic's tax regime has been a driving factor for the popularity of the SEs.

The above analysis makes it obvious that the principal reason for the high and growing number of SEs in the Czech Republic is the flexibility offered to prospective businesses, both by the state and the professional service providers. This flexibility is demonstrated in the minimal regulatory burden under which companies must operate. It is also seen in the ample opportunities for companies to make use of the financial services offered by professional service providers and lenders. This may be why, "since February 2006, The World Bank officially considers the Czech Republic a standard, fully developed free market economy."⁸⁷⁸ These principal findings demonstrate the success of the SEs in the Czech Republic. Most of the companies that have set up an SE in the country are small or medium-sized businesses: 1808 SEs out of 1898 registered SEs in the country have fewer than five employees.⁸⁷⁹ In other Member States, such enterprises would be dissuaded from becoming an SE by the high minimum registered capital requirement. The loan facilities on offer in the Czech Republic remove this requirement. This analysis disproves the finding from Ernst & Young's study, which found that the only negative driver for setting up an SE in Czech Republic was the requirement of the minimum registered capital: "An SE is required to have a higher minimum registered capital (EUR 120,000) than a national public limited liability company (only approximately EUR 80,000)".⁸⁸⁰

This case study suggests that a Member State can make the formation of an SE more attractive in two ways. First, it can make the formation process less bureaucratic and burdensome. Secondly, by offering financial help to businesses – either through selling the company or by offering a loan – and either through the state itself or by means of commercial financial institutions – Member States could

⁸⁷⁸ L Stehlik, 'Financing a Start-up Company in the Czech Republic' (AGS)

<<https://www.expats.cz/prague/article/prague-business/start-up-companies/>> accessed 28 April 2017.

⁸⁷⁹ 'SE Companies: Facts and Figures 2017' (*SEEurope*, March 2017)

<<http://www.worker-participation.eu/European-Company-SE/Facts-Figures>> accessed 25 April 2017.

⁸⁸⁰ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (*Ernst & Young*, 2008)

<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf> accessed 28 April 2017.

remove the first hurdle faced by any small or medium-sized business wanting to become an SE: the minimum registered capital of €120,000.

CHAPTER 8- THE FUTURE OF THE SE v EUROPEAN COMPANY LAW

8.1 Introduction

Constantly changing economic and social realities in Europe put in question the future of conventional industrial relations, and employee involvement in particular. Employee involvement predominantly channelled through trade unions has now become questionable.

The UK should ideally be moving towards the future by embedding social democracy in its industrial relations. It seeks to further fairness at work and the fair treatment of employees,⁸⁸¹ to ensure industrial success by augmenting flexibility in employee involvement, and encouraging innovation and efficiency.⁸⁸² To achieve increased productivity and a high-value economy, the focus is now on legislating for greater workplace cooperation.⁸⁸³ Mechanisms for the collective representation of employees such as trade unions will not be bolstered, but merely embraced as an instrument of promoting workplace cooperation. Nonetheless, the current economic scenario is disappointing and does not show any signs of a high-value economy; instead, the recent quarterly growth and levels of GDP for the UK data from the Office for National Statistics reported that the UK economy rose by just 0.2% in 2017's first quarter.⁸⁸⁴

If they are to improve the economic condition of Member States like the UK and sustain a better future for employees and their involvement rights, EU legislators must, as a first step, learn the lessons from the 2008 financial crisis. Bagdi notes that the crisis caused escalated market competition and, on that basis, groups companies into two categories: first, companies that decided to cut costs and made collective redundancies, thereby causing peak unemployment in many Member States; and second, companies that resolved to overcome the financial crisis by

⁸⁸¹ Board of Trade, *Fairness at Work* (White Paper, Cm 3968, 1998), para 1.8.

⁸⁸² Board of Trade, *Fairness at Work* (White Paper, Cm 3968, 1998), para 1.3-1.4.

⁸⁸³ Board of Trade, *Fairness at Work* (White Paper, Cm 3968, 1998), para 1.3.

⁸⁸⁴ 'Monthly economic commentary: July 2017' (*Office for National Statistics*, July 2017) <<https://www.ons.gov.uk/economy/nationalaccounts/uksectoraccounts/articles/monthlyeconomiccommentary/july2017>> accessed 11 August 2017.

opening dialogue with the employees on decision-making, working conditions and risk management, with a view to regaining profitability.⁸⁸⁵

As a next step, EU legislators must amend the ECS so that such legislation promotes an effective working model of board-level employee representation rights, since doing so will be instrumental in mitigating future crises.⁸⁸⁶ Additionally, EU Company Law collectively needs major reform in those aspects that were identified during consultations and reports submitted to the EC.

This chapter analyses the EC's consultation process that has directly affected the ECS. If the EC had a functional consultation mechanism, it would have generated interest and responses from stakeholders, which would have most likely led to an effective revision of the ECS. This could have been a major contributing factor in addressing the shortcomings in the ECS. A holistic view of European Company Law is taken in this chapter since the SE is an integral part of any European company, the future of the SE and European Company Law is entwined. Further, the feasibility or viability of the SE Directive in terms of cross-border facilitation will also be evaluated, as it is arguable that the Cross-Border Mergers Directive may have overshadowed or duplicated it.

8.2 Critiquing the EC's consultation process

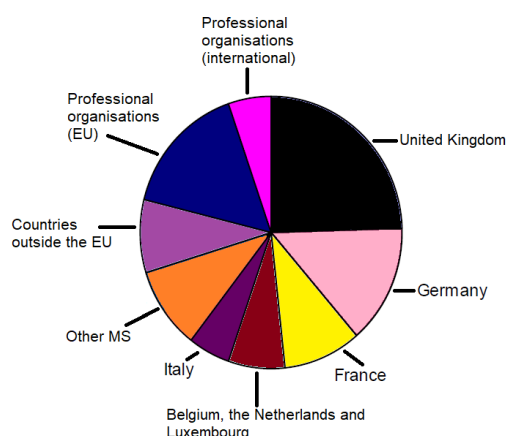
EU Company Law has been gradually developed as a Europe-wide body of legislation. It has provided for the SE to become a company form and for the establishment of entities like the European Economic Interest Grouping (EEIG). EU Company Law has also harmonised domestic law in the Member States in respect of: (i) shareholder rights; (ii) divisions and mergers; (iii) minimum regulations for single-member private companies; (iv) financial accounting and reporting; (v) branch disclosure; (vi) takeover bids; and (vii) preserving a public company's capital.

In 2003, the EC issued a consultation document on reviewing the future of EU Company Law. It was the first consultation to review the future of the ECS.

⁸⁸⁵ K Bagdi, 'The Future of Employees' Board-Level Representation in the European Union' (2015) 23 *Procedia Economics and Finance* 1394-1400.

⁸⁸⁶ *Ibid.*

'Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward'⁸⁸⁷ received responses from across Europe, but the least number came from British stakeholders, despite the UK being the Member State that made most submissions (see, *Figure 6- Company law submissions to the EU by Member States* below).



*Figure 6- Company law submissions to the EU by Member States*⁸⁸⁸

Stakeholders like The Association of British Insurers (ABI), which makes formal submissions on the EU Company Law communications, on this occasion submitted that any appropriate and desirable modifications to the ECS in practice was “not a priority”, despite making detailed comments on other questions raised in the consultation.⁸⁸⁹ The Expert Forum of Financial Services Users (Fin-Use) produced a vague response on the ECS question by merely submitting that it supports the development of the ECS.⁸⁹⁰ This response stood out because, out of 14 responses

⁸⁸⁷ Commission, 'Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward' COM (2003) 284 final.

⁸⁸⁸ 'Synthesis of the responses to the Communication of the Commission to the Council and the European Parliament on Modernising Company Law and Enhancing Corporate Governance in the European Union- A Plan to Move Forward' (*ECGI*, 15 November 2003) <http://www.ecgi.org/commission/documents/governance_consult_responses_en.pdf> accessed 23 April 2017.

⁸⁸⁹ 'Response of the Association of British Insurers on the European Commission Consultation on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union' (*The Association of British Insurers*) <https://www.abi.org.uk/globalassets/sitecore/files/documents/consultation-papers/2006/03/euactionconsult_280306142841.pdf> accessed 18 April 2017.

⁸⁹⁰ 'Consultation on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union' (*Expert Forum of Financial Services Users*, 30 March 2006) <http://ec.europa.eu/internal_market/fin-use_forum/docs/comp_law-corp_govern-2006_03_30.pdf> accessed 18 April 2017.

on company law questions that were submitted by Fin-Use, the one on ECS was the only single sentence response.⁸⁹¹

Directorate General (DG) Internal Market and Services published a report stating that many major stakeholders and representatives had criticised the methodology recommended in the consultation's 'Action Plan' for resolving employee involvement issues within the ECS.⁸⁹² They resolutely opposed the idea that the ECS would be applicable

*"...in a somewhat compulsory way in cases of cross-border mergers or transfer of seat, as well as rules that could lead to the import of different systems of employee participation in countries where such a system did not exist."*⁸⁹³

The report rationalised that this opposition may result in deterring cross-border mergers and could challenge the competitiveness of European companies. The report suggested that the applicable law should be that of the Member State in which the incorporated company was merged or the one to which the seat was transferred. Furthermore, it was also suggested that the SE Directive should encompass investment funds so that it could allow fund managers to elucidate their fund ranges. The problems associated with cross-border mergers stand as one of the foremost hurdles for investment funds in achieving a single market.

In 2012, the EC consulted trade unions, business federations, universities, liberal professions, individuals, investors, public authorities, think tanks, civil society and consultants across the EU on the future of company law in the EU.⁸⁹⁴ Its objectives were to investigate the viability of the current company law legislation and whether amendments were necessary to meet market and societal needs. The consultation

⁸⁹¹ Ibid.

⁸⁹² 'Synthesis of the responses to the Communication of the Commission to the Council and the European Parliament on Modernising Company Law and Enhancing Corporate Governance in the European Union- A Plan to Move Forward' (ECGI, 15 November 2003) <http://www.ecgi.org/commission/documents/governance_consult_responses_en.pdf> accessed 23 April 2017.

⁸⁹³ Ibid.

⁸⁹⁴ 'Consultation on the Future of European Company Law' (European Commission, 2012) <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=5780&lang=en&tpa_id=1007> accessed 11 April 2017.

looked at issues such as: (i) reviewing the capital regime for companies in the EU, so that the existing minimum capital requirements and procedures on capital upkeep do not constitute a considerable impediment to dividend distribution;⁸⁹⁵ (ii) the need to merge all EU Company Law Directives to make them more effective; (iii) reviewing the extent and objectives of EU Company Law and exploring further areas for harmonisation; (iv) whether the EC should initiate legislation on problems in relation to groups of companies;⁸⁹⁶ (v) the need for additional legislation on cross-border movement of EU companies; and (vi) the significance and limitations of legal entities within the EU (for example, the SE).⁸⁹⁷

DG Internal Market and Services collected 496 responses from 26 Member States, and from a few countries outside the EU.⁸⁹⁸ It was disappointing to note that many stakeholders who responded to this consultation considered the significance and limitations of the SE as “low priority” (e.g. European Company Law Experts (ECLE)) or had “no opinion” on it (e.g. The Quoted Companies Alliance (QCA)).⁸⁹⁹ ECLE submitted that “EU company legal forms are not among the top priorities for EU intervention”⁹⁰⁰. BNP PARIBAS made the minimum response of stating that if an ‘attractive tax device’ were to be added to the SE Directive, it would generate more

⁸⁹⁵ Plausible review of the Second Council Directive 1977/91/EEC of 13 December 1976 on coordination of safeguards, which for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent throughout the Community [1977] OJ L26/1: this is no longer in force.

⁸⁹⁶ Previous efforts by the Commission were unsuccessful to establish an all-inclusive EU legislative structure of groups of companies.

⁸⁹⁷ Also, investigating the viability of proposed models like European Model Company Act as an appropriate substitute to traditional harmonisation.

⁸⁹⁸ ‘Summary of Responses to the Public Consultation on the Future of European Company Law’ (European Commission, July 2012)

<http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf> accessed 1 June 2017.

⁸⁹⁹ QCA is a non-profit membership organisation functioning for small and mid-cap quoted companies and is a founding member of ‘EuropeanIssuers’ (representing > 9000 quoted companies in 14 Member States).

‘QCA response European Commission consultation on the future of European Company Law’ (The Quoted Companies Alliance, 18 May 2012)

<http://www.theqca.com/article_assets/articledir_116/58197/QCAResponsetoEC_EuropeanCompanyLaw_May12.pdf> accessed 17 April 2017.

⁹⁰⁰ ‘Response to the European Commission’s Consultation on the Future of European Company Law’ (European Company Law Experts, May 2012)

<http://ec.europa.eu/internal_market/consultations/2012/company_law/additional-information/european-company-law-experts-ecl-additional-comments_en.pdf> accessed 16 April 2017.

interest.⁹⁰¹ However, the details of such a tax device were left for the EC to imagine. Sweden's official response was that, due to a broad absence of interest in the SE from trade and industry, the resources should be better utilised on other regulatory work, as it believes that the number of registered SEs is still far too low.⁹⁰² It was expected that Sweden would have something more substantial to add to the review of the SE, as Swedish corporate governance was considered to be the best in the world by the World Economic Forum during that time.⁹⁰³

8.3 Achieving superior EU Company Law and corporate governance regulation strategy

EU legislators should consider four areas of reform to improve EU Company Law and develop a strategy for regulating corporate governance.

First, EU legislators should enforce an ECS codetermination model that would require the inclusion of employees across all Member States. It is unacceptable that domestic legislation on codetermination embraces only employees that work domestically and overlooks employees that are based in subsidiaries or regional offices in other Member States. For example, Volkswagen AG has no employee representatives in the supervisory boards of their Spanish subsidiary SEAT or of their Czech Republic subsidiary ŠKODA.⁹⁰⁴ If these branches were to be shut down, employees in Spain and the Czech Republic are in a much more unfavourable position than employees based in Germany. Even if this cannot be categorised as discrimination against a foreign workforce, the situation violates European common

⁹⁰¹ 'BNP PARIBAS Response to the European Commission Consultation on the Future of European Company Law' (BNP PARIBAS, 2012) <https://group.bnpparibas/uploads/file/european_20company_20law_20_20european_20commission_20consultation_20_20may_202012_1.pdf> accessed 2 May 2017.

⁹⁰² Additional comments on Consultation on the Future of European Company Law (Ministry of Justice Sweden, 2012) <http://ec.europa.eu/internal_market/consultations/2012/company_law/additional-information/swedish-ministry-of-justice-additional-comments_en.pdf> accessed 7 July 2017.

⁹⁰³ See, 1st pillar, 1.19, p311, available at:

'The Global Competitiveness Report 2010–2011' (World Economic Forum, 2010) <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf> accessed 13 April 2017.

⁹⁰⁴ 'Code of Conduct at ŠKODA Group- Member of the Volkswagen Group' (ŠKODA, 2012) <<http://www.skoda-auto.com/SiteCollectionDocuments/company/compliance/en/coc-2012.pdf>> accessed 14 July 2017.

market principles.⁹⁰⁵ An enforced ECS codetermination model should require the inclusion of employees across all Member States and be applicable to all companies with cross-border functions. Individual Member States would take little interest in taking these measures.

Secondly, to harmonise codetermination, EDR – the revised model of the negotiation procedure – should be made mandatory for all companies with cross-border functions within the EU. The benchmark of companies performing cross-border functions could be further scrutinised.⁹⁰⁶ The SE Directive provides that employee involvement provisions in the SE will be based upon negotiations between the management and employees before an SE is created. This provision allows for an adjustable mechanism of employee involvement that is tailor-made to the specific needs of the particular company. Member States may be permitted to apply default statutory provisions in the case of failed negotiations, thereby ensuring that national differences would stay intact.

Third, to harmonise European Company Law, EU legislators should create a functional mechanism that effectively regulates the acceptance or blocking of reform proposals by Member States. The details of such a mechanism do not form a part of this research. This may seem an autocratic proposal, as the EU without its Member States is nothing; however, every Member State has a different view on employee involvement. The ECS took more than four decades to come into force. Such differences and delays are the major impediment to harmonise EU corporate governance, company law and labour law. Historically, the radically diverse approaches to employee involvement across the EU have impeded the development of new supranational company forms and provisions. If ‘enhanced cooperation’ between Member States could be achieved (Article 326 - 334 of The Treaty on European Union), the harmonisation of European Company Law will be more swift and effective. Shortcomings and inadequacies could be much more quickly revised and implemented.

⁹⁰⁵ ‘The Internal Market: General Principles’ (*European Parliament*, 2017) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuid=FTU_3.1.1.html> accessed 12 July 2017.

⁹⁰⁶ This is not discussed for the purpose of this research.

Lastly, EU legislators must firmly encourage Member States to participate in the consultation process. The UK, for example, largely ignored consultations by the EC on the ECS.⁹⁰⁷

Achieving greater participation could be achieved by implementing an extensive impact evaluation by stakeholders and interested parties in Member States for any novel piece of legislation. This can be further coupled with Member States, ensuring that stakeholder bodies directly affected by the novel legislation must be obliged to make comprehensive submissions on the consultations.⁹⁰⁸ This may raise enforcement issues if Member States do not comply with the obligation to submit responses; such issues could be met by imposing considerable financial penalties on the Member States. These states are part of an EU club; as with many clubs, effective participation is necessary to ensure the longevity of the club's aims and objectives.

The EC must also reorganise the consultation process, to make it more systematic and effective and to encourage reorganisation of the consultation process in Member States. On average, consultations by the EC have a response deadline of 12 weeks and late submissions are rarely acknowledged. The EC must realise that much legislation is technically and operationally complex; stakeholders and interested parties must have sufficient time to respond. Insufficient response time could lead to multiple consultations.

Multiple consultations also often result from the failure of the consulting body to properly anticipate and comprehend the scale of the legislation in question and the questions or issues covered. For example, in the UK, the Council Directive No 2014/65/EU⁹⁰⁹ (hereafter, referred to as the "MiFID II Directive") has been consulted over six times, with the implementation date being January 2018. This multiplication of consultations results from the fact that many areas that were initially consulted upon were not wide-ranging. Consultees were identifying new issues with every

⁹⁰⁷ Member State that makes the most formal submissions to EC on company law.

⁹⁰⁸ Presently, stakeholders' are not obliged to respond to consultations.

⁹⁰⁹ Council Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349.

consultation and the minimal response time made the process arduous.⁹¹⁰ The latest consultation paper (Markets in Financial Instruments Directive II Implementation - Consultation Paper VI, CP17/19) was published on 3 July 2017 and has a response time of just over eight weeks (7 September 2017).⁹¹¹ It is also astonishing to find that this latest consultation, and the previous consultation paper (Markets in Financial Instruments Directive II Implementation - Consultation Paper V, CP17/8)⁹¹² both consulted on the same issue of 'implementation proposals'; evidently there were shortcomings in identifying these 'implementation proposals' on the first instance.⁹¹³

8.4 Cross-Border Mergers Directive v SE Directive

The lack of legal certainty has constantly affected the cross-border mobility of companies in the EU. Decades ago, the issue of cross-border mobility was about objectives; today it is about proper procedure. The development of case law and rationale from *Cartesio*,⁹¹⁴ *Überseering*⁹¹⁵, *Inspire Art*,⁹¹⁶ *Centros*⁹¹⁷ and *Daily Mail*⁹¹⁸ has laid the foundation for interpreting freedom of establishment and cross-border movement within Member States.

Before the transposition of the Cross-Border Mergers Directive, the SE was highly beneficial and instrumental in enabling companies to merge simply across Member States. The Cross-Border Mergers Directive simplified a complicated, costly and onerous process into a readily available company law instrument.

⁹¹⁰ 'Markets in Financial Instruments Directive II Implementation - Consultation Paper VI' (*Financial Conduct Authority*, July 2017) <<https://www.fca.org.uk/publications/consultation-papers/cp17-19-mifid-ii-implementation>> accessed 11 July 2017.

⁹¹¹ Ibid.

⁹¹² 'Markets in Financial Instruments Directive II Implementation - Consultation Paper V' (*Financial Conduct Authority*, March 2017) <<https://www.fca.org.uk/publications/consultation-papers/cp17-8-mifid-ii-implementation-proposals-v>> accessed 11 July 2017.

⁹¹³ Paragraph 1.2, Markets in Financial Instruments Directive II Implementation - Consultation Paper VI, CP17/19 - "This sixth CP on issues related to the implementation of MiFID II covers a small number of Handbook changes which we have not previously been able to consult upon", available at: Markets in Financial Instruments Directive II Implementation - Consultation Paper VI, CP17/19 (*Financial Conduct Authority*, July 2017)

<<https://www.fca.org.uk/publication/consultation/cp17-19.pdf>> accessed 11 July 2017.

⁹¹⁴ Case 210/06 *Cartesio Oktató és Szolgáltató bt* [2008] WLR (D) 400.

⁹¹⁵ Case 208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919.

⁹¹⁶ Case 167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] I-10155.

⁹¹⁷ Case 212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

⁹¹⁸ Case 81/87 *R (Daily Mail and General Trust plc) v HM Treasury* [1988] ECR 5483.

The Cross-Border Mergers Directive has itself faced procedural complications, but overall is successful in advancing economic activity between Member States. Between 2008 and 2012, the number of cross-border mergers has risen by a staggering 173% (there were 132 cross-border mergers in 2008, which by 2012 rose to 361).⁹¹⁹

The Cross-Border Mergers Directive also considerably increased the prospective scope of board-level employee representation by making it more global.⁹²⁰ It makes the significant distinction between a monistic and a dualistic board structure. The application of board-level employee representation policies in an SE is only relevant to companies in which representation rights existed preceding the merger. The issue of employee involvement actually limits the progress of companies with monistic board structure. Co-determination structures offering more than one-third board-level employee representation is usually customised to the supervisory boards' participation. Their objective is to institute employee representation in overseeing corporate governance, but not to engage the employee representatives in the company's actual management. Therefore, any potential provisions must distinguish between the monistic board structure and dualistic board structure.

The agreement adopted in the Cross-Border Mergers Directive ought to be applied to all EU company forms. Member States would then be able to call for one-third board level employee representation in all forms of EU companies with a monistic board structure. Article 16 (4)(c) of the Cross-Border Mergers Directive permits Member States to introduce regulations allowing companies with a monistic board structure to restrict board-level employee representation to one-third. This provision is put into practice by the UK (the only Member State to have done so) in § 39, Chapter 5 of The Companies (Cross-Border Mergers) Regulations 2007,⁹²¹ which provides that:

⁹¹⁹ 'Bech-Bruun Study on the Application of the Cross-Border Mergers Directive' (*Lexidale*, 2013) <http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf> accessed 10 July 2017.

⁹²⁰ Article 16 of the Cross-Border Mergers Directive.

⁹²¹ SI 2007/2974.

“the UK transferee company may limit the proportion of directors elected, appointed, recommended or opposed through employee participation to a level which is the lesser of one third of the directors”.

The SE was intended to apply to companies with cross-border functions across the EU and to minimise trade limitations, thus primarily focusing on EU companies. But it has also appealed to international businesses that wish to expand in the EU.

Businesses outside the EU can enter the market by creating a subsidiary with an EU partner company. For example, Narada (one of the foremost battery suppliers and manufacturers worldwide)⁹²² incorporated a joint venture subsidiary called Narada Europe SE with its Norwegian partner Eltek⁹²³ (an energy and transmissions systems supplier to the telecommunication sector).⁹²⁴ Narada owns 60% of Narada Europe SE and the remaining 40% is owned by Eltek. The SE was formally established by Eltek Sweden and Eltek Norway to complete legal technicalities of establishment (at least two participating companies must have an EU origin).⁹²⁵ The driving factor for this SE's incorporation was the convenience in cross-border mobility of transfer of the headquarters and registration office to any other Member State provided under the SE Directive.⁹²⁶

At present, both the SE and the ECS seem minimally attractive. The shortcomings of the SE have contributed to its potential not being fully utilised, and to its being a less acceptable and less popular form of company. The SE Regulation should be urgently revised to make the SE more sustainable, by dealing with the issue of transferring a company from one Member State's jurisdiction to another.

⁹²² 'About Narada' (*Narada*) <<http://en.naradapower.com/index.php/about/company>> accessed 12 July 2017.

⁹²³ 'Home' (*Eltek*) <<http://www.eltek.com/>> accessed 12 July 2017.

⁹²⁴ C Cathiard, 'The European Company (SE): Good Reasons to adopt the SE Status' (2011) <https://blogavocat.fr/space/catherine.cathiard/content/the-european-company--se---good-reasons-to-adopt-the-se-status_c823a8f5-c663-4937-89b5-dd1f9899484f> accessed 12 July 2017.

⁹²⁵ T Barras, 'Societas Europaea - The European Company' (2004) <<http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=25>> accessed 12 July 2017.

⁹²⁶ Narada Europe SE has monistic corporate governance structure and has no employees. See, Sandra Schwimbersky and Melinda Kelemen, 'Established, planned and liquidated SEs' (*European Trade Union Institute*, 2008) <www.worker-participation.eu/.../SE%20Factsheets%20overview%2020080106.pdf> accessed 13 July 2017.

The SE Regulation falls short in six significant aspects when compared with the sophisticated Cross-Border Mergers Directive.⁹²⁷ First, the SE cannot be a European form of company because of frequent references to Member State domestic law in the SE Regulation, which provides many diverse variations subject to the company law of the Member State where it was incorporated.

Second, the SE cannot be created by a choice *ab initio*, but needs the former incorporation of companies from other Member States to create the SE as a subsidiary or merge into an SE. The form is only offered to domestic public type companies (i.e. a PLC or an AG).

Third, the SE Directive provides for separate systems of employee involvement, effectively placing this matter within the jurisdiction of a Member State's domestic legislation. In a merger, the matter can come under the jurisdiction of either of the Member States involved.

Fourth, the flexibility of the SE is reduced because the registered office must be in the same Member State as the real seat's location. The SE does not have the freedom of domestic companies to relocate their real seat anywhere in the EU. EU legislators did not foresee the situation of the SEs being obligated to comply with the 'real seat' theory. The issue of an SE having its head office and registered office in the same Member State is not a concern for 'real seat' Member States because, in those states, national company forms operate under similar conditions. If a company's management is transferred to another Member State, it would no longer be identified as a company in the original Member State; instead, it would be considered dissolved.

'Incorporation theory' Member States like the UK do not have this condition. A company's management can be relocated to any Member State without the company losing its legal personality. Arguably, the requirement to have an SE's registered office and head office in the same Member State is excessively prohibitive and

⁹²⁷ 'Report of the Reflection Group on the Future of EU Company Law' (*European Commission*, 5 April 2011)
<http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf> accessed 10 July 2017.

disadvantageous in 'incorporation theory' Member States like the UK. Further, there is uncertainty about the definition of 'head office', as it lacks legal meaning.

Fifth, the legal capital to set up an SE – €120,000 – is exorbitantly high for small or medium-sized companies. The amount is almost five times the required threshold of a domestic PLC (Article 6 of the 2nd Company Law Directive)⁹²⁸. Notwithstanding, if financial flexibility is offered to businesses by their respective members states or EU then this may be less problematic for small or medium-sized companies (as seen with the Czech Republic in *Section 7.6 Case Study: The Czech Republic (an SE haven)*).

Lastly, SE will never be attractive if the SE Directive is not in harmony with business time constraints. The EC should shorten the time it takes to establish an SE, which is currently anywhere between six and twelve months.

Bech-Bruun's study indicated that the Cross-Border Mergers Directive was instrumental in increasing cross-border mergers, especially in the aftermath of the 2008 financial crisis, when cross-border mergers and acquisitions had drastically decreased.⁹²⁹ Thus, it can be fairly predicted that there will be further growth in cross-border mergers, with a probable impact on cross-border employee involvement, particularly in Member States with comparatively low levels of board-level employee representation. To increase the SE's attractiveness, the EC must take into account the revision proposals mentioned previously.⁹³⁰ The SE's cross-border merger practice requires alignment with that of the Cross-Border Mergers Directive, which is better structured.

⁹²⁸ Council Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [2012] OJ L315/74: this is no longer in force.

⁹²⁹ 'Bech-Bruun Study on the Application of the Cross-Border Mergers Directive' (*Lexidale*, 2013) <http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf> accessed 10 July 2017.

⁹³⁰ See, *Chapter 7- Reviewing the European Company Statute*.

That being said, there is much work to be done to reduce the procedural complexities of cross-border functions and movement of companies within the EU. On 2 February 2012, the European Parliament put before the EC a resolution on a 14th Company Law Directive on the cross-border transfer of company seats, to:

*“...allow companies to exercise their right of establishment by migrating to a host Member State without losing their legal personality but by being converted into a company governed by the law of the host Member State without having to be wound up.”*⁹³¹

It is suggested that the mobility question must be governed by the uniformity rule within the domestic legislation of a Member State and considering the neutrality rule among various methods of cross-border mobility.⁹³² A standardised regulatory framework ought to deal with the consequences of a company’s movement across a border, with cross-border mergers, with the transfer of registered office or with conversion to the available company form vehicles in the host Member State or available EU company form vehicles like the SE.

Another procedural complexity is the absence of a uniform business register.⁹³³ The EC believes that combining business registers across the EU will encourage cross-border business and save up to €70 million every year as:

“company registers provide company information that is essential for consumers and business partners alike, such as information on a company's legal form, its seat, capital and legal representatives...help to facilitate cross-border electronic access to business information, by ensuring business registers are updated, and business information is more easily and readily accessible. These changes are crucial for

⁹³¹ ‘European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI))’ (2013/C 239 E/03) <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012IP0019&from=EN>> accessed 1 June 2017.

⁹³² Both from a tax law standpoint and / or company law standpoint.

⁹³³ Presently, business registers are catalogued at local level, regional level or national level and there is an apparent demand to share information in a clear and resourceful way.

*companies when setting up branches, conducting cross-border trade or providing cross-border services in the EU.*⁹³⁴

It is of the utmost importance to manage company information and share companies registers within the EU. The effective date of most companies' resolutions with respect to cross-border activities is conditioned to their cataloguing in the business register of the companies concerned. An EC Working Staff document regarding the interconnection of central, commercial and companies' registers has suggested that, to achieve an effective cross-border activities system, it must be supplemented by a suitable regulation of the upkeep and usability of companies' information across Member States.⁹³⁵

8.5 Brexit- The Future of the SE in the UK

Contingent on the Brexit negotiations that will be adopted in the near future, EU Company Law incorporated in the British legal system may be either obliterated in its entirety or certain handpicked provisions amended to suit the system. There remains uncertainty about the future direction of the EU, if and when the Brexit happens, the status of the UK and the changing dynamics of the EU company law. There is certainty, however, on the fact that European corporate entities like SE with registered offices in the UK will lose their legal identity, as they are built on EU Regulations. The impact after Brexit on the SEs in the UK will lead to two possible outcomes: (i) most of the SEs in the UK will either move to other Member States (e.g. Ireland); or (ii) the SEs that choose to remain will be automatically converted into a UK company form (e.g. PLCs).⁹³⁶ Such companies will be prone to onerous disclosure requirements or burdensome administrative issues if they had branches or subsidiaries in other Member States. Therefore, it will be easier for SEs to

⁹³⁴ 'Linking business registers across Europe will stimulate cross-border trade and save up to 70 million euro a year' (*European Commission*, 24 February 2011) <http://europa.eu/rapid/press-release_IP-11-221_en.htm?locale=en> accessed 13 June 2017.

⁹³⁵ 'Commission Staff Working Document on Impact Assessment to the Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers' (*European Commission*, 2010) <http://ec.europa.eu/internal_market/company/docs/business_registers/20110224_impact_en.pdf> accessed 1 June 2017.

⁹³⁶ Similarly, UK company forms will no longer be able to convert into an SE. Further, free movement of companies, cross-border mergers and cross-border conversions will become inaccessible if the relevant Member States do not offer mutual and bilateral provisions permitting cross-border conversions or mergers for companies outside the EU.

relocate to other Member States. German companies which are established as SEs in the UK will inevitably relocate to other Member States, as Erik Schweizer (President of the Association of German Chambers of Industry and Commerce-DIHK) notes that “Brexit will significantly damage the business of German companies with the UK” after a survey of 2,200 companies published by the DIHK.⁹³⁷ KPMG produced an impact analysis report which highlights some following aspects that will need due consideration by European corporate entities like the SE after Brexit:

<i>Aspect</i>	<i>Consideration</i>
Practicability of transfer in time	The questions and possibility to transfer all appropriate functions (including, but not limited to, productive assets); and considering possibilities for moving European head offices.
Legal and tax structure	Considering a new form of company and/or planning a contractual basis for transferring the SE's head offices; considering exit taxes and carry forward tax losses; considering subsidies loss received in the UK; updating the changes in the VAT set-up; and revising the service level agreement regime.
Human resources	Elaborating a communication policy which will coherently clarify the transfer to current employees and increase retention; transferring employee groups to the new locations; and protecting the transfer of knowledge (i.e. where current employees in the UK are substituted by the new employees).
Assets, licences and properties	Moving all appropriate contracts, intellectual property and assets; applying for new licences, permits and market authorisations to guarantee their legitimacy for all EU businesses; and implementing new local health, security and environment standards.
Operations	Revising invoices and flow of goods; adopting set-ups like financial reporting to meet the new local standards; and updating the IT systems to conform with the new organisational structure.

*Table 15- Aspects for consideration to transfer the SE's head offices and operations from the UK to other Member States*⁹³⁸

ECS has been transposed in UK's legislation like any other Member States. Even though post Brexit, these laws will surrender their status as measures based on the EU law and promoting cross-border operations, they may still serve as the foundation for cross-border associations. A company form like an SE can serve as an ideal model of a company form for the UK after Brexit. It is suggested that if the UK addresses the novel solutions identified in this research on the shortcomings of the European Company Statute, then it can be inspired to develop a new company

⁹³⁷ 'European and Japanese business groups warn of Brexit impact' *ft* (28 March 2017) <<https://www.ft.com/content/1573e85e-13b6-11e7-b0c1-37e417ee6c76>> accessed 19 December 2017

⁹³⁸ 'Brexit- An Impact Analysis' (KPMG, 2017) <<https://home.kpmg.com/content/dam/kpmg/de/pdf/Themen/2017/brexit-strategy-impact-analysis-non-eu-2-2017-KPMG.pdf>> accessed 20 December 2017

form based on the features of the SE. This will at least ensure that there is a theoretically perfect form of company in the UK and any practicalities issues can be swiftly revised after running public consultations, when this new company form has had 1, 3 and 5 years of experience.

CHAPTER 9- CONCLUSION

This research has demonstrated that employee involvement, and board-level employee representation rights in Member States in particular, have been undermined by using the SE as an instrument, despite board-level employee representation being recognised as a fundamental right within the EU (Article 153 of The Treaty on European Union and Article 27 of the Charter of Fundamental Rights of the European Union⁹³⁹).

Additionally, the variations in employee involvement traditions, legislation and practices across the EU make it arduous to achieve any uniformity on the subject. It is clear that EU legislators have made an attempt to enshrine board-level employee representation in EU Company Law, but this attempt seems futile, as there are loopholes in existing EU law. The data gathered in this research has identified only a few instances when companies within the EU have used the SE Directive to circumvent employee involvement rights in practice⁹⁴⁰ (due to various limitations the data gathered on this point were minimal), but it is still theoretically possible to do so and some SEs may have done so.

An ideal definition of ‘employee representation’⁹⁴¹ can be a first step towards achieving consistency. Such a definition will remove any confusion about the relevant words in the different languages spoken across the Member States, lessen ambiguities and limit the freedom for interpretation in different Member States.

Chapter 2- Justifying Employee Involvement in Corporate Governance demonstrated that employee involvement is an essential contributor to a company’s governance. Employee involvement does not restrict a board’s power to function effectively; objections based on a corporate owner’s property rights can be dismissed. Any corporate law issue needs to outweigh its disadvantages so that the issue becomes a positive aspect of governance. Employee involvement undoubtedly enhances a

⁹³⁹ [2016] OJ C202.

⁹⁴⁰ For example, GfK SE, Fresenius SE and Surteco SE

⁹⁴¹ See, *Chapter 1- Employee Involvement in the EU’s Corporate Governance Regime*

company's value through the participation of representatives in rational and knowledgeable decision-making.

Nonetheless, research conclusions can be confusing, especially when ambiguous issues are debated from the perspectives of various countries. The timing of the research, the political traditions and trade union traditions of a particular country, the composition and values of the company, research methodology and the personal positive or negative mind-set of the researcher all seem to influence research conclusions. The debate remains open. The German position, which dominates most of the literature review, provides successful examples of employee involvement, and the economic and governance success of the German companies is unquestionable.

EU law currently takes a potentially laissez-faire approach towards employee involvement. Hence, the term 'neglected' is often used to describe employee representation at board level. It is also important to note that we may not need to debate the issue of imposing employee involvement because the benefits speak for themselves: it helps to generate higher shareholder value, company value and stock value; it benefits employees; and it contributes to good corporate governance. The obstacles in recognising these arguments lie within the political traditions of some Member States, the antagonistic nature of some companies that are unwilling to share power with employees, and the perceptions and agendas of some trade unions.

This research concludes that the ECS has brought substantial reforms (for example with issues like board-level employee representation, which had been outstanding for decades in the EU) and seeks to promote social and economic integration. It is, however, still new in its approach and has many 'striking similarities' with the present EWC Directive (for example, the creation of SNB).⁹⁴² EU Directives effectively have no great impact on domestic and EU Company Law because they are under-enforced (choice to restrict the directive's scope); because they regulate or cover peripheral issues; and because they are interpreted and enforced differently in each

⁹⁴² B Keller and F Werner, 'New Forms of Employee Involvement at European Level- The Case of the European Company (SE)' (2011) *British Journal of Industrial Relations* 629-630.

Member State.⁹⁴³ Similarly, the SE Directive only provides a basic framework and the detailed rules of law have been left to the discretion of the Member State where the SE is registered; and the SE Regulation refers to domestic legislation of Member States frequently. The SE Directive potentially takes a laissez-faire approach to employee involvement, but it cannot be denied that attempts and changes have been made to increase social welfare.

With respect to the tax-related issues while setting up an SE or transferring an SE's registered office, EU legislators will have to move forward to create a balance of interests between free movement of the SEs and the freedom to establish and offset tax planning.⁹⁴⁴ In order to develop the SE's economic status in comparison with similar domestic legal business entities, no biased legislative tax laws should be adopted. Nonetheless, an appropriate tax framework needs be drafted to resolve the existing SE's tax problems.

The ECS has set the foundations for a comprehensive and a suitable system that would assist in achieving the objectives of SE and of the EU. But this foundation is incomplete and sometimes contradicts the SE's objectives: for example, encouraging employee representation at board level while creating provisions to allow companies to circumvent it. Aspects of the employee participation negotiation procedure have been left uncertain by the SE Directive (as discussed in *Section 3.3 The Efficiency of the SE Directive*). However, the SE Directive is still new in its application and SE is still not a common choice among global or even EU companies. But the shortcomings of the directive should not be ignored: shortcomings that defeat the fundamental principles of the statute and the rights provided under Article 153 of The Treaty on European Union.

If the EU is to refer to German corporate governance in developing its own policy, then, rather than adopting it wholesale, specific advantageous features of the model must be identified to influence other governance systems. The German corporate

⁹⁴³ L Enriques, 'EC Company Law Directives And Regulations: How Trivial Are They?' (2006) 27 (1) University of Pennsylvania Journal of International Law 2-78.

⁹⁴⁴ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (*Ernst & Young*, 2008)
<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf>
accessed 11 March 2015.

governance model is not without its faults. Codetermination (see, *Section 4.4 Codetermination: An ideal corporate governance feature of the EU*) is one of the features of German corporate governance that is absent in the Anglo-American model; if adopted, it can serve as an unequivocal exhibition of social democracy. Even during the financial crisis of 2008, codetermination in Germany was applauded for its 'progressive effects owing to its impact to efficiently measuring the crisis concentrated on social partnership'.⁹⁴⁵

The EU has regarded employee involvement as a central constituent of the EU social market economy. EU Company Law has adopted most aspects of codetermination in its Cross-Border Mergers Directive,⁹⁴⁶ European Cooperative (SCE) and the ECS.

Other aspects of the German corporate governance model are worthy of merit. The German audit system is undoubtedly efficient and provides a true picture of a company's performance (see, *Section 4.9 Enhanced auditing systems*), as well as helping it to avoid conflicts of interest. Agency costs can never be totally mitigated, and agency problems can never be fully resolved. An ideal corporate governance mechanism (see, *Section 4.5 Minimal agency costs in German corporate governance model*) successfully mitigates agency conflicts by finding optimal resolutions, advancing the normative goal of cumulative social welfare and acknowledging rights of the involved parties, especially employees.

Different company players will always seek to further their interests. EU corporate governance follows a mixture of stakeholder and shareholder theories, but it is suggested that more emphasis should be put on securing the interest of stakeholders. The other transacting parties' interests can be well administered and furthered if there is a good corporate governance mechanism, as demonstrated by the German system. Any corporate governance mechanism should advance the interests of the company as a whole. Agency costs between company players, or other issues that arise in the company, should be statistically weighed for their

⁹⁴⁵ Sick et al., 'Workers' Participation in Europe' (*Hans Boeckler Foundation*, August 2014) <http://www.boeckler.de/pdf/p_mbf_report_aug_e_2014.pdf> accessed 23 October 2015.

⁹⁴⁶ Council Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310.

advantages and disadvantages, and the decision should be based on seeking to resolve the most detrimental issue first.

Any suggestion for improving corporate governance in EU cannot be absolute. Factors like social practices, history, work traditions, and trade union principles affect the corporate governance mechanisms in each Member State. It can be theoretically concluded that, if certain aspects of German corporate governance (as identified in *Chapter 4- Lessons from the German Model of Corporate Governance*) are applied in Member States that have different forms of governance, then it might have a positive result on that Member State's social culture and the economy as a whole. EU legislators can be commended for introducing SE, which enshrines most of these aspects of German corporate governance. They have left it optional for companies to accept this form of company, which will in a few years provide clear data that can be used as a comparison with other EU company forms. It will only be then that aspects like the economic effect of codetermination can be empirically checked.⁹⁴⁷

In contrast to Germany, the UK's position can be concluded as one of falling trade union membership, ineffective employee information and consultation mechanisms, unreceptive works councils and a corporate governance structure that is long outdated. Measures like re-opening the consultation process on SE and employee involvement will increase awareness of the SE and advertise the advantages of employee involvement. These objectives could also be met if HM Revenue and Customs introduces tax incentives for companies setting up as an SE or companies that qualify for board-level employee representation. Financial lending institutions or other similar service providers can be encouraged to provide loans and services at attractive rates to the SEs or qualifying companies that advance employee involvement. This has proven to be particularly successful, as per the findings of this research (see, *Section 7.6 Case Study: The Czech Republic (an SE haven)*). These efforts will outweigh the legal and regulatory complexities in setting up an SE.

Industrial democracy in the UK has failed. If the UK is to survive the economic changes ahead, it must embed employee involvement in its companies as a matter

⁹⁴⁷ See, last paragraph of *Section 4.4 Codetermination: An ideal corporate governance feature of the EU*.

of principle. Employee involvement will bring about the reform in the UK's corporate governance that is needed to protect the long-term interests and success of its companies. The correlation between employee involvement and improved corporate governance (especially decision-making) has been found to be widely positive in most Member States. It would be naive to assume that all the lessons from German corporate governance will solve all the UK's governance issues, but it cannot be denied that Germany survived financial recession and is still leading the EU economy, while the UK has barely progressed.

Systems of board-level employee representation in the EU are diverse. A system of employee representation that may work for one Member State is not guaranteed to succeed in another. There can be no definitive answer on whether board-level employee representation falls within the scope of company law or labour law; there is extensive latitude to interpret domestic board-level employee representation provisions or the provisions within the ECS. *Section 6.2 The separation of employees between company law and labour law* suggests that, if labour law is categorised as the regulation of an inter-connected relationship among employees, employers and trade unions,⁹⁴⁸ then one may define board-level employee representation within the scope of labour law. However, if company law is categorised as the regulation of characteristics like limited liability, designated management under a board structure, legal personality, transferable shares and investor ownership, then board-level employee representation may conveniently fall within the scope of company law.⁹⁴⁹ Therefore, the boundary between board-level employee representation provisions under company law or labour law will remain blurred,⁹⁵⁰ save for the adoption of SE as an appropriate company form, which would result in uniformity in the interpretation of its provisions in each individual Member State.

The notion of a pan-European company, based on a uniform set of laws that increase the possibilities of cross-border business, is yet to be fully achieved. The

⁹⁴⁸ Employer and the employees (employment contractual relationship); employers and trade unions (tortious relationship); and trade union and the employees (membership contract relationship).

⁹⁴⁹ A Conchon, 'Employee Representation in Corporate Governance: Part of the Economic or the Social Sphere?' (2011) European Trade Union Institute Working Paper 2011.08 <<http://ssrn.com/abstract=2221786>> accessed 28 July 2016.

⁹⁵⁰ As each Member State have categorised board-level employee representation on the basis of their own national culture, competition, union membership, sector and the size of the organisation.

SE as a form of company brings many benefits to businesses intending to expand across the EU. It has the benefit of administrative flexibility and promotes a 'social Europe' through employee involvement. That being said, the ECS contains limitations that have stopped SE achieving its potential, particularly in terms of: (i) the absence of tax and insolvency provisions; (ii) the obscurity of the employee negotiation procedure; and (iii) the potential to misuse the ECS to circumvent employee involvement rights in companies intending to establish as an SE.

Many businesses would be inclined to adopt the SE, if it offered a unified set of tax and insolvency rules. The tax debate on SE has initiated dialogue on the prospect and structure of a European-level tax regime,⁹⁵¹ and the Common Consolidated Corporate Tax Base (CCCTB) proposal gained popularity more than a decade ago.⁹⁵² Kirshner's research also provided evidence that 'most companies favoured it'.⁹⁵³

The obscurity of the employee negotiation procedure can be mitigated by the adoption of the proposed EDR mechanism (see, *Section 7.2 Introducing 'Employee Dispute Resolution' (EDR) to the negotiation process*). This model will ensure the effective transition of the negotiation procedure, which currently is one of the deterrents of setting up an SE (time frame between 6 to 12 months). This negative driver was also identified in the 'Study on the operation and the impacts of the Statute for a European Company (SE)'.⁹⁵⁴

The Czech Republic case study provided an important insight on the popularity of SEs. The findings coherently demonstrated that by offering financial help to businesses (either through the state itself or by means of financial/professional

⁹⁵¹ See, CT Da Costa and AdM Bilreiro, *The European Company Statute* (Kluwer Law International 2003) 176.

⁹⁵² Commission, 'Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, Towards an Internal Market Without Tax Obstacles – A Strategy for Providing Companies with a Consolidated Corporate Tax Base for Their EU-wide Activities' COM (2001) 582.

⁹⁵³ J Kirshner, "'An Ever Closer Union" in Corporate Identity?: A Transatlantic Perspective on Regional Dynamics and the *Societas Europaea*' (2010) 84 (4) St. John's Law Review 1308.

⁹⁵⁴ 'Study on the operation and the impacts of the Statute for a European Company (SE) - 2008/S 144-192482' (*Ernst & Young*, 2008)
<http://ec.europa.eu/internal_market/consultations/docs/2010/se/study_SE_9122009_en.pdf>
accessed 11 December 2016.

services providers) – Member States could remove the first hurdle of high minimum capital requirement to set up an SE faced by any small or medium-sized business. This is a significant aspect to achieve viability of an SE, and it must be paid due consideration by the EC when reviewing the SE Directive.

The EC has not acted to improve the attractiveness of SE to businesses. It has identified the shortcomings of the SE Directive, but failed to address them. Further, the failure by the EC and other stakeholders to advertise the advantages of the SE as a preferred corporate form for EU businesses makes the SE a less well-known option, and the widely anticipated disadvantages of adopting it make it minimally attractive. The SE Regulation provides for measures to formally address its shortcomings.

Harmonising EU laws appears to be the only rational choice to create uniformity and contribute to social welfare, whether in relation to agency conflicts or worker issues. Representation of employees on corporate boards contributes valuable first-hand operational knowledge to corporate board decision-making and facilitates strong measures for checking and reducing agency costs within the company.

Revising the EU consultation process should be one of the EC's top priorities. The 'Summary of Responses to the Public Consultation on the Future of European Company Law' is subject to much criticism itself as a part of the consultation process.⁹⁵⁵ The report by the DG Internal Market and Services (*Section 8.2 Critiquing EC's consultation process*) gave only a 'qualitative presentation' of the responses and omitted any statistical data that could have been beneficial for research purposes. Additionally, the apparent lack of interest in commenting on the review of the SE Directive by stakeholders, public bodies and other interested parties was also a major factor in preventing the SE from becoming a popular company form. It would therefore be beneficial if the EC demonstrated in its summary of response report any indication of possible initiatives that the EC might assume in the future in this area. Respondents would be able to see their recommendations and

⁹⁵⁵ 'Summary of Responses to the Public Consultation on the Future of European Company Law' (*European Commission*, July 2012)
<http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf> accessed 1 June 2017.

comments acknowledged, thereby generating more responses in future and encouraging non-responding stakeholders to make submissions.

The Cross-Border Mergers Directive is an effective instrument for cross-border activities. Its application has been popular and will continue to be so in the future. Therefore, it is imperative that the EC considers and addresses the revision of the ECS more than ever now, so that SE does not lose its viability or its 'unique selling point' as the image of a European form of company.

The EC must reform the ECS swiftly so that SE can become a viable substitute for national company forms. In doing so, it should take note of the flexibility of national company forms in Member States. Amending the ECS would mean simplifying it, so that Member States would be limited in their options to regulate the application terms of the ECS. This will ensure that a perfect EU company vehicle will be available to businesses from China, Russia and India – and, indeed, from anywhere else in a rapidly globalising economic environment.

This research has demonstrated that while the SE Directive has the potential to meet the objectives stated in Article 153 of The Treaty on European Union and make employee involvement a prominent aspect of EU corporate governance, but it can also be used as a mechanism to circumvent codetermination rights. If EDR was to be introduced and the conversation in *Section 7.5 Specific recommendations to the ECS* considered, then the legal uncertainties in the SE Directive with respect to negotiation procedures and employee involvement procedures can be dealt with adequately. There has been no considerable shift in attitude towards employee involvement in the UK, but rather various futile attempts and conversations. A uniform model of board-level employee representation is imperative to achieve the social objectives of the EU, as the employee involvement rights within corporate boards across the Member States differ substantially. A revised ECS is an ideal solution to bring about that uniformity, as it has been demonstrated that the ECS in its current form has not really brought about the change that was anticipated after decades of political negotiations.

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